

**THE EFFECTIVENESS OF THE EU RACE EQUALITY DIRECTIVE AT
NATIONAL LEVEL
A COMPARATIVE STUDY OF BRITISH AND SPANISH LEGISLATION AND
POLICIES**

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Abstract

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The effectiveness of the EU Race Equality Directive at national level.

A comparative study of British and Spanish legislation and policies

The EU Race Equality Directive (RED) was adopted in 2000 to foster the development of a basic legal framework to address racism and, more generally, *to put into effect* the principle of equal treatment at national level. However, there are some concerns that the effects of the RED have not been as far-reaching as expected. Through a comparative study between Britain and Spain, this thesis analyses whether the RED has triggered effective legislation and policies in these jurisdictions, and which factors and actors may be relevant to improve the effectiveness of racial equality legislation and policies.

Initially, the thesis acknowledges that the RED's potential to trigger effective regulatory strategies at national level is constrained by its underlying enforcement model, based mainly on individual litigation. Building upon the theory of the Social Working of Law, the concept of effectiveness is defined as the combination of 'ex-ante effectiveness', which contributes to *preventing* discrimination, and 'ex-post effectiveness', which *minimises* the negative effects that discrimination has on victims, once it has occurred.

This distinction is used to frame the comparative analysis, which is conducted in three building blocks. Firstly, it is argued that formal adjudication has intrinsic limitations because victims bear the burden to initiate legal proceedings but, at the same time, the system deters them from doing so. Secondly, it is submitted that a diverse network of advice-providers (ie equality bodies, trade unions and NGOs) and an appropriate use of Alternative Dispute Resolution mechanisms can contribute to improving ex-post effectiveness. Finally, this thesis also recognises the importance that employers' policies can have in preventing discrimination, such as those derived from positive duties, collective bargaining and voluntary initiatives. However, the thesis also concedes that the effectiveness of employers' policies largely depends on the regulatory framework, social awareness about racial discrimination and workforce participation.

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Abbreviations

Acas	Advisory, Conciliation and Arbitration Service
ACCEM	Asociación Comisión Católica Española de Migraciones
ADR	Alternative Dispute Resolution
BIS	Department for Business, Innovation & Skills
BITC	Business in the Community
BOE	Boletín Oficial del Estado
CA	Court of Appeal
CAB	Citizens' Advice Bureaux
CARD	Campaign Against Racial Discrimination
CBI	Confederation of British Industry
CCOO	Comisiones Obreras
CE	Constitución Española
CEAR	Comisión Española de Ayuda al Refugiado
CEB	Comprehensive Equality Bill
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEPYME	Confederación Española de la Pequeña y Mediana Empresa
CERD	Committee on the Elimination of Racial Discrimination
CES	Consejo Económico y Social
CGPJ	Consejo General del Poder Judicial
CGT	Confederación General de Trabajadores
CIPD	Chartered Institute of Personnel Development
CIS	Centro de Investigaciones Sociológicas
CJEU	Court of Justice of the European Union
CLP	Current Legal Problems
CMD	Case Management Discussion
CMLRev	Common Market Law Review
CRE	Commission for Racial Equality
CSI-F	Central Sindical Independiente y de Funcionarios
CSR	Corporate Social Responsibility
CUP	Cambridge University Press
DCLG	Department for Communities and Local Government
DMCS	Department for Media, Culture & Sport
EAT	Employment Appeal Tribunal
EBEP	Estatuto Básico del Empleado Público
EC	European Community
ECCM	European Code of Conduct for Mediators
ECHR	European Convention of Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EEC	European Economic Community
EHRC	Equality and Human Rights Commission
EJML	European Journal of Migration and Law

ELJ	European Law Journal
ELRev	European Law Review
EN	Explanatory Notes
ENAR	European Network Against Racism
EOC	Equal Opportunities Commission
EP	European Parliament
EqA	Equality Act
ER	Equality Representative
ERA	Academy of European Law
ET	Employment Tribunal
ET	Estatuto de los Trabajadores
ETRP	Employment Tribunal Rules of Procedure
EU	European Union
FAO	Food and Agriculture Organisation of the United Nations
FED	Framework Equality Directive
FJ	Fundamento Jurídico
FRA	EU Agency of Fundamental Rights
FSG	Fundación Secretariado Gitano
FSG	Fundación Secretariado Gitano
GEL	Gender Equality Law
GEO	Government Equalities Office
HNC	Higher National Certificate
HRC	United Nations Human Rights Committee
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IJDL	International Journal of Discrimination and Law
ILJ	Industrial Law Journal
ILO	International Labour Organisation
INE	Instituto Nacional de Estadística
JCHR	Joint Committee on Human Rights (UK Parliament)
JCHR	Joint Committee on Human Rights
JEPP	Journal of European Public Policy
LISOS	Ley de Infracciones y Sanciones del Orden Social
LJ	Law Journal
LJS	Ley reguladora de la Jurisdicción Social
LOEX	Ley Orgánica de Extranjería
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
MPDL	Movimiento por la Paz, el Desarme y la Libertad
MPG	Migration Policy Group
MS	Member States
MTIN	Ministerio de Empleo y Seguridad Social
NGO	Non-Governmental Organisation
OBERAXE	Observatorio Español del Racismo y la Xenofobia
OHCHR	Office of the High Commissioner for Human Rights
OJ C	Official Journal of the European Union (Communication Series)

OJ L	Official Journal of the European Union (Legislation Series)
OJLS	Oxford Journal of Legal Studies
OPEU	Publication Office of the European Union
OSCE	Organization for Security and Cooperation in Europe
OUP	Oxford University Press
PCC	Post-claim conciliation
PLEM	Pacto Local por el Empleo de Mérida
RD	Real Decreto
RED	Race Equality Directive
Rec	Recommendation
Res	Resolution
RRA	Race Relations Act
SAP	Sentencia de la Audiencia Provincial
SASF	Semi-Autonomous Social Field
SC	Supreme Court
SETA	Survey of Employment Tribunal Applications
SJP	Sentencia del Juzgado de lo Penal
SJS	Sentencia del Juzgado de lo Social
SME	Small and Medium Enterprises
SREC	Spanish Racial Equality Council
STC	Sentencia del Tribunal Constitucional
STS	Sentencia del Tribunal Supremo
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TS	Tribunal Supremo
TUC	Trade Union Congress
TULRCA	Trade Union and Labour Relations (Consolidation) Act
UGT	Unión General de Trabajadores
UN	United Nations
UNGA	United Nations General Assembly
WERS	Workplace Employment Relations Study

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Council Directive (EC) 2004/113 of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37

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UN

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Chapter 1. Introduction

1.1 Context

This thesis analyses how national legislation and policies stemming from the EU Racial Equality Directive ('RED')¹ work *in practice* in Britain and Spain. The RED was adopted in 2000 and was largely understood as an EU symbolic move against racism and discrimination. It sought not only to lay down a basic legal framework against racial discrimination in every Member State ('MS'), but also to *put into effect* the principle of equal treatment in the long term. However, whilst the RED minimum requirements have been transposed to most MS, this has often not yielded the expected social effects. Indeed, the European Commission recently recognised that although the RED has been transposed into national law, 'there are still challenges to [its] implementation and application'.² The Commission has identified several specific problems which need to be addressed at national level, *inter alia*, the lack of awareness of equality rights, the lack of equality data, high underreporting rates, barriers to access justice and the limited effectiveness of sanctions and remedies in some MS.³ It is submitted that whilst the academic literature has profusely written about the RED, it has not properly addressed the flaws which arise in its practical application and which undermine its effectiveness.

This investigation seeks to address this gap by, firstly, focusing on how national racial equality legislation and policies work in practice in Britain and Spain. In so doing, I do not only consider national laws transposing the RED, but also other sources, like procedural law or social policies, as well as the role of key actors, such as equality bodies, trade unions, NGOs, mediators or legal professionals. Secondly, this research does not only analyse traditional uses of the law through formal complaints and litigation, but also organisational and informal uses, which despite

¹ Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

² Commission (EU), Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC of 27 November establishing a general framework for equal treatment in employment and occupation COM(2014) 2 final, 4.

³ *ibid* 4-7.

their quantitative importance, have often been neglected in discussions about equality law enforcement. For that purpose, the first part of the thesis develops an analytical framework based on the theory of the Social Working of Law, which divides the analysis of enforcement mechanisms according to their relevance for ex-ante effectiveness (to prevent discrimination) and ex-post effectiveness (once discrimination has occurred, to alleviate the victim or sanction the perpetrator). This framework is then used as the skeleton for the comparative analysis in the second part of the thesis. The added value of this study lies also on the comparison between the way in which racial equality legislation and policies work in two legal cultures as different as the Spanish –from the civil law tradition– and the British –from the common law tradition. This comparison leaves room for identifying different ways to achieve effectiveness in the fight against racism, which can potentially be relevant and inspirational for different countries and different legal systems.

1.2 *Research questions*

On that basis, this study seeks to answer two main research questions. Firstly: *has the Racial Equality Directive triggered effective legislation and policies to address racial discrimination in Britain and Spain?* This, in turn, is addressed through two more detailed questions, namely:

-Is the Racial Equality Directive enough to trigger effective legislation and policies on its own?

-If not, which factors and actors influence the effectiveness of the application of the racial equality legislation and policies in Britain and Spain?

Secondly, through the comparative analysis of the British and the Spanish experience, this thesis also seeks to determine *how the effectiveness of racial equality legislation and policies can be improved at national level.*

1.3 *Literature review*

The RED has been widely studied in both the academic and the grey literature. This section briefly discusses the main issues which have been explored so far and highlights where the originality of this research project lies.

The literature

A first group of commentators has analysed the negotiation of the directive itself,⁴ including the lobbying process that led to its adoption.⁵ A second group of contributions provide a general analysis and evaluation of the RED.⁶ They underline the symbolic importance of the adoption of the directive,⁷ its advantages and shortcomings.⁸ Some of these authors have also compared the RED to the standards laid down under the European Convention of Human Rights or other international conventions.⁹

Another trend in the literature is the discussion of theoretical aspects of the RED, such as the concept of race, or the concepts of direct and indirect discrimination. In this regard, three innovative features of the RED which have often retained the attention of commentators are positive action,¹⁰ the duty to set up an

⁴ A Tyson, 'The Negotiation of the European Community Directive on Racial Discrimination' (2001) 3 EJML 199-229.

⁵ See eg I Chopin, 'The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment' (1999) 1 EJML 111; I Chopin, 'Possible Harmonisation of Anti-discrimination Legislation in the European Union: European and Non-governmental Proposals' (2002) 2 EJML 413; I Chopin and J Niessen, *Proposals for Legislative Measures to Combat Racism, and to Promote Equal Rights in the European Union* (Commission for Racial Equality/The Starting Line 1998); I Solanke, *Making Anti-Racial Discrimination Law. A comparative history of social action and anti-racial discrimination law* (Routledge 2009) 164-190.

⁶ See eg M Bell, *Racism and Equality in the European Union* (OUP 2008) 63-88.

⁷ E Howard, 'The EU race directive: its symbolic value – its only value?' (2004) 6 IJDL 141.

⁸ See eg E Guild, 'The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations' (2000) 29 ILJ 416; S McInerney, 'Legal Protection against Discrimination based on Racial and Ethnic Origin under European Union Law - Necessary but not Sufficient?' (2003) IJDL 3; E Howard, 'The EU Race Directive: Time for change?' (2007) 8 IJDL 237.

⁹ See eg M Bell, 'Combating Racism through European Laws: A Comparison of the Racial Equality Directive and Protocol 12' in I Chopin and J Niessen (eds), *Combating Racial and Ethnic Discrimination: taking the European Legislative Agenda Further* (MPG/Commission for Racial Equality 2002) 22.

¹⁰ See eg D Caruso, 'Limits of the Classic Method: Positive Action in the European Union after new Equality Directives' (2003) 44 Harvard International Law Journal 331; Commission (EC), *Putting Equality Into Practice: What Role For Positive Action* (OPEU 2007); S Fredman, 'Changing the norm: positive duties in equal treatment legislation' (2005) 12 MJ 369-398; M Maisonneuve, 'Les discriminations positives ethniques ou raciales en droit public interne: vers la fin de la discrimination positive française?' [2002] Revue française de Droit Administratif 561.

equality body¹¹ and the concept of protection against victimisation.¹² The adoption of the RED also fostered a general debate about the anti-discrimination policy of the EU.¹³ The literature has extensively discussed whether EU equality directives endorse substantive equality¹⁴ and the evolution of the principle of equality, both at EU level¹⁵ and in a broader human rights¹⁶ and international context.¹⁷ The interaction of the RED with other areas of law has also been explored, mainly concerning its implications for EU migration law,¹⁸ third country nationals,¹⁹

¹¹ F Esteve García, 'Las Directivas europeas contra la discriminación racial y la creación de organismos especializados para promover la igualdad: análisis comparativo de su transposición en España y en Francia' [2008] *Revista de Derecho Constitucional Europeo* 189-230; G Moon, 'Chapter Eight: Enforcement Bodies' in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007) 871; R Holtmaat, *Catalysts for Change? Equality bodies according to Directive 2000/43/EC - existence, independence and effectiveness* (OPEU 2007); J Niessen and J Cormack, 'National specialised equality bodies in the wake of the EC antidiscrimination Directives' in J Cormack (ed), *Considerations for establishing single equality bodies and integrated equality legislation* (MPG 2004) 21; B de Witte, 'National Equality Institutions and the Domestication of EU Non-Discrimination Law' (2011) 18 MJ 157.

¹² M J Connolly, 'Victimising Third Parties: The Equality Directives, the European Convention on Human Rights, and EU General Principles' (2010) 35 ELRev 822 – 836; M Ambrus, 'The Concept of Victimisation in the Racial Equality Directive and in the Netherlands: A Means for Effective Enforcement of the Right to Equal Treatment' (2011) 36 *Nederlands Tijdschrift voor de Mensenrechten/NJCM-Bulletin* 9-23.

¹³ See eg M Bell, 'The implementation of European anti-discrimination directives: converging towards a common model?' (2008) 79 *Political Quarterly* 36.

¹⁴ E Howard, 'The European Year of Equal Opportunities for All—2007: Is the EU Moving Away From a Formal Idea of Equality?' (2008) ELJ 168; G Kostadinova, *Substantive equality, positive action and Roma rights in the European Union* (Minority Rights Group International 2006); M Ambrus, K Henrard, M Busstra, 'The Racial Equality Directive and Effective Protection against Discrimination: Mismatches between the Substantive Law and its Application' (2010) 3 *Erasmus Law Review* 165.

¹⁵ See eg C Barnard, 'Changing Scope of the Fundamental Principle of Equality' (2000) McGill LJ; L Waddington, 'The Expanding Role of the Equality Principle in European Union Law', Policy Papers, European University Institute, 2003 <<http://infoportal.fra.europa.eu/InfoPortal/publicationsDownloadFile.do?id=396>> accessed 15 April 2014; G More, 'The principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P Craig, G De Burca (eds), *The Evolution of EU Law* (OUP 1999) 517; E Ellis, 'The Principle of Non-Discrimination in the Post-Nice Era' in A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002) 291; M Bell, 'Equality and Diversity: Antidiscrimination Law after Amsterdam' in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart 2000) 157.

¹⁶ S Fredman, 'Europe with a Social Face: Equality and Social Rights in the European Union' (2001) 22 ILJ 1467; C McHugh, 'Equality Principle in EU Law: Taking a Human Rights Approach' (2006) 14 *Irish Student Law Review* 31.

¹⁷ M A Oddny, 'Non-discrimination in International and European Law: towards substantive models' [2007] *Nordic Journal of Human Rights* 140.

¹⁸ M C Brown, 'The Race Directive: Towards Equality For All the Peoples of Europe?' (2002) 21 *Yearbook of European Law* 195; R Cholewinski, 'Borders and Discrimination in the European Union' in M Anderson and J Apap (eds), *Police and Justice Co-operation and the New European Borders* (Kluwer 2002) 81; S Lavenex, 'Towards the constitutionalization of alien's rights in the European Union?' (2006) 13 JEPP 1284.

¹⁹ L Roseberry, 'Like carrying water with a sieve: an analysis of the new EC Race Discrimination Directive from a comparative legal historical perspective' [2001] *Juridisk Institut – Jubeløg* 247; S

minority protection,²⁰ and the extent to which it clashes with civil law,²¹ especially with the freedom of contract.²²

In addition, the RED has been analysed in relation to issues of intersectionality²³ and as regards other equality directives,²⁴ especially the Framework Equality Directive ('FED')²⁵ because some of the FED provisions are almost identical to the RED.²⁶ However, there are also notable differences between the two, especially regarding the material scope: whilst the FED applies only to employment, the RED applies also to education, social protection and access to goods and services,²⁷ which has sometimes been perceived as fostering a hierarchy of discrimination grounds.²⁸

A significant part of the academic literature also evaluates the transposition of the RED at national level. Most contributions focus on the implementation and

Benedi Lahuerta, 'Race Equality and TCNs, or how to fight discrimination with a discriminatory law' (2009) 15 ELJ 738; F Brenna, 'The Race Directive, Institutional Racism and Third Country Nationals' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty First Century* (Vol)]]2, Hart 2004) 371; E Muir, 'Enhancing the Protection of Third-Country Nationals Against Discrimination: Putting EU Anti-Discrimination Law to the Test' (2011) 18 MJ 136.

²⁰ M Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (Eleven 2011); M J Busstra, *The Implications of the Racial Equality Directive for Minority within the European Union* (Eleven 2011).

²¹ See eg F Von Westphalen, 'Einige Überlegungen zum Gesetzentwurf zur Verhinderung von Diskriminierungen im Zivilrecht' [2002] Zeitschrift für das gesamte Schuldrecht 283.

²² B Schöbener and F Stork, 'Anti-Diskriminierungsregelungen der Europäischen Union im Zivilrecht - zur Bedeutung der Vertragsfreiheit und des Rechts auf Privatleben' [2004] Zeitschrift für Europarechtliche Studien 43.

²³ See eg Commission (EC), *Tackling Multiple Discrimination. Practices, policies and laws* (OPEU 2007); D Schiek and V Chege (eds), *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law* (Routledge 2009) 45; D Aschiagbor, 'Multiple discrimination in a multicultural Europe: achieving labour market equality through new governance' (2009) 61 CLP 265.

²⁴ C Costello and E Barry (eds), *Equality in Diversity - The New Equality Directives* (Irish Centre for European Law 2003); M Bell, 'A Patchwork of Protection: The New Anti-Discrimination Law Framework' (2004) 67 MLR 465; E Ellis, *EC Anti-Discrimination Law* (OUP 2005); L Flynn, 'The Implications of Article 13 EC: after Amsterdam, will some forms of Discrimination be more Equal than Others?' (1999) 36 CMLRev 1127; D Schiek, 'A New Framework on the Equal Treatment of Persons in EC Law?' (2002) 8 ELJ 290-314.

²⁵ Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

²⁶ See eg C McCrudden, 'Theorising European Equality Law' in Costello and Barry (n 24) 1, 12-13.

²⁷ See eg M Bell, 'Beyond European Labour Law? Reflections on the EU Racial Equality Directive', (2002) 8 ELJ 384-399.

²⁸ L Waddington and M Bell, 'More equal than others: distinguishing European Union Equality Directives' (2001) 38 CMLRev 587-611; M Bell and L Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 6 ELRev 349; E Howard, 'The case for a considered hierarchy of discrimination grounds in EU Law' (2006) 13 MJ 445-470.

effects of the directive in specific MS,²⁹ but the European Parliament (EP) or the EU Agency of Fundamental rights (FRA) have also produced reports on the overall application of the RED in MS,³⁰ and think tanks, like the Migration Policy Group, publish annual reports on the transposition of the RED on each MS³¹ as well as comparative reports.³²

Finally, the enforcement of the RED has also been covered by the academic literature, but only to a limited extent.³³ It has generally been analysed in a broader context, together with other anti-discrimination or employment legislation.³⁴ Some authors have developed recommendations to improve the application of anti-discrimination law in general,³⁵ and others have focused on remedies and sanctions,³⁶ but only few have specifically concentrated on the enforcement of the RED.³⁷ Among them, Mason developed an original normative framework highlighting the limitations of the RED, but his analysis remains essentially

²⁹ See eg C Kimber, 'The Directive on Race Discrimination in Ireland: Reform or Radical Change?' in Costello and Barry (n 24) 243; L Cachón, 'España y la Directiva 2000/43: de la "ocasión perdida" a una legislación general sobre igualdad de trato' [2004] *Tiempo de Paz* 13; I P Asscher-Vonk and M Schlachter, 'Verbot der Diskriminierung wegen Alters in den Niederlanden und Deutschland: die Umsetzung der EG-Rahmenrichtlinie gegen Diskriminierung 2000/78/EG' (2005) 7 *Recht der Internationalen Wirtschaft* 503.

³⁰ Parliament (EC), 'Report on progress made in equal opportunities and non-discrimination in the EU' (A6-0159/2008); FRA, *The Racial Equality Directive: application and challenges* (OPEU 2012).

³¹ See MPG, Anti-discrimination country reports <www.migpolgroup.org/publications_info.php?id=18> accessed 20 October 2014.

³² See eg I Chopin and C Germaine-Sahl, *Developing Anti-Discrimination Law in Europe. The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (OPEU 2013) 87.

³³ FRA, *The impact of the racial equality directive : views of trade unions and employers in the European Union. Strengthening the fundamental rights architecture in the EU* (OPEU 2010); FRA, *The Race Equality Directive* (n 30).

³⁴ M Malmberg, *Effective Enforcement of EC Labour Law* (Iustus Förlag 2003); I Higgins, 'Enforcement and the New Equality Directives' in Costello and Barry (n 24) 391; E Barry, 'Different Hierarchies – Enforcing Equality Law' in Costello and Barry (n 24) 411.

³⁵ C McCrudden, 'Regulating Discrimination: Advice to a Legislator on Problems Regarding the Enforcement of Anti-Discrimination Law and Strategies to Overcome Them' in T Loenen and P Rodrigues (eds), *Non-discrimination law: comparative perspectives* (Martinus Nijhoff Publishers 1999) 427; J Niessen, 'Making the Law Work. The Enforcement and Implementation of Anti-Discrimination Legislation' (2003) 5 *EJML* 249; D Schiek, 'Diskriminierung wegen "Rasse" oder "ethnischer Herkunft": Probleme der Umsetzung der RL 2000/43/EG im Arbeitsrecht' (2003) 2 *Arbeit und Recht* 44.

³⁶ M Benecke and G Kern, 'Sanktionen im Antidiskriminierungsrecht: Möglichkeiten und Grenzen der Umsetzung der Europäischen Richtlinie im deutschen Recht' (2005) 12 *Europäische Zeitschrift für Wirtschaftsrecht* 360; C Tobler, *Remedies and Sanctions in EC non-discrimination law* (OPEU 2005) 8.

³⁷ See eg I Solanke, 'Beyond Transposition: Activating the EU Race Directive' [2007] *European Current Law* xi – xvii.

theoretical.³⁸ Makkonen has also discussed the gap between theory and practice in racial equality legislation, putting emphasis both on formal and informal enforcement mechanisms, but he has not developed a framework of analysis or examined in detail how informal mechanisms work in practice.³⁹

Originality

From this review it emerges that commentators have only marginally investigated the enforcement of the RED, and they have tended to take a rather formal approach –focusing mainly on adjudication through judicial or administrative procedures. This research fills that gap in various ways.

By combining a theoretical and a practical approach to the analysis of the racial equality legislation and policies, the central objective of this thesis is not only to *identify* potential flaws in the enforcement of the RED, but also to *understand why* these limitations arise and find avenues to *overcome* them. Other authors have endeavoured to find out how the effectiveness of EU equality law could be improved, but the novelty of this research lies partly on the analytical strategy, based on the Social Working of Law, a legal anthropology theory developed by Griffiths to explain the social effects of legislation.⁴⁰ On the basis of this theory, the analytical framework developed in Chapter 2 considers the different types of uses of equality law –from its spontaneous application to litigation– and the decisions that potential victims would take to face discrimination according to their bargaining power, the assistance provided by ‘filters’ (ie professionals and organisations which provide advice to victims) and the options available (eg adjudicative v non-adjudicative procedures). These elements are then incorporated into the analysis of the law in practice in the comparative chapters. By examining the role of relatively unexplored tools and actors in employment discrimination, ie Alternative Dispute Resolution (‘ADR’) mechanisms, filters (eg equality bodies, trade unions and NGOs) and

³⁸ L Mason, ‘The Hollow Legal Shell of European Race Discrimination Policy: The EC Race Directive’ (2010) 53 *American Behavioral Scientist* 1731.

³⁹ T Makkonen, ‘Equal in Law, Unequal in Fact: Racial and ethnic discrimination and the legal response thereto in Europe’ (PhD thesis, University of Helsinki 2010) 270-283.

⁴⁰ See eg J Griffiths, ‘The Social Working of Legal Rules’ (2003) 48 *Journal of Legal Pluralism* 1.

businesses policies (introduced either at their own initiative or through collective bargaining), this research adds a new dimension to the existing literature.

1.4 Methodology

This thesis follows a *socio-legal* methodology⁴¹ because its main aim is not to describe the ‘*law in the books*’ but rather to analyse the ‘*law in action*’.⁴² It concerns the ‘usefulness’ of law in real life and whether it has an impact on individuals and groups.⁴³ The law is considered a tool of social intervention⁴⁴ to combat racism, which should nevertheless be closely linked to social values and needs in order to be effective.

At the same time, this thesis aims to be both *evaluative*⁴⁵ and *reform oriented*.⁴⁶ On the one hand, it assesses whether the RED is being applied effectively at a national level; on the other, it identifies socio-legal strategies to overcome the current difficulties in the application of racial equality laws and policies.

Research methods

Despite the recognition that this thesis follows a socio-legal methodology, the analysis is conducted through a multi-method approach, mostly based on doctrinal research, but also through limited empirical research in the form of semi-structured interviews.

The purpose of the interviews is to ‘explore, probe and ask questions’,⁴⁷ to shed light on practical issues that purely theoretical analysis cannot explain, for instance, the reasons why victims are deterred to pursue a claim and what could be done to reverse this trend. They are also used to confirm with experts and equality

⁴¹ I make the distinction between ‘*methodology*’, which relates to the theoretical background to approach and understand the field of study, and ‘*method*’, which relates to the techniques which are used to pursue a research project, see R Cryer, T Hervey and B Sokhi-Bullet, *Research Methodologies in EU and international Law* (Hart 2011) 5.

⁴² R Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review*, discussed by D Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4 *Legal Studies* 162.

⁴³ *ibid.*

⁴⁴ Nelken (n 42) 163.

⁴⁵ I Dobinson and F Johns, ‘Qualitative Legal Research’, in M McConville and W H Chui (eds), *Research Methods for Law* (Edinburgh University Press 2010) 20, 32.

⁴⁶ *ibid.*

⁴⁷ FAO, ‘Semi-structured interviews’ <www.fao.org/docrep/x5307e/x5307e08.htm> accessed 1 February 2012.

professionals that the hypotheses are reasonable.⁴⁸ In this respect, from a 'law in action' perspective, the opinion and the way of acting of 'law enforcers' is crucial.⁴⁹ For instance, earlier research has shown that

[I]nterviews with staff and civil servants working in Ombudsmen [...] can reveal any gaps in the documentation, and the underlying motives and assumptions of the ombudsmen and their staff.⁵⁰

To ensure that not only the perspectives from legal professionals were considered, but also from employees and employers, in each country I interviewed at least an NGO representative, a trade union representative, an equality body representative, a business organisation representative and a lawyer/legal professional with expertise in anti-discrimination law (see Annex I).⁵¹ Interviews to these equality stakeholders have proved very useful to collect information which could not be derived from statutes and case law. For instance, Spain has low litigation rates but the reasons are unclear and there are almost no official statistics on equality litigation to shine light on the matter. However, NGOs receive numerous complaints and have internal data bases which can only be accessed through their employees. Furthermore, NGOs have direct contact with victims so they can clarify why they are reluctant to litigate. Regarding Britain, equality stakeholders also provided information on how the relatively recent 2010 Equality Act and last changes to employment tribunals' procedure are affecting the practice.

The modality of *semi-structured* interviews was preferred over others due to its flexibility, as the interviewer has the chance to follow up on topics that may arise during conversation. The effective enforcement of racial equality law is an open issue where many different views are possible. Therefore, this flexibility was necessary to potentially identify and explore 'new ways of seeing and understanding the topic'.⁵²

⁴⁸ *ibid.*

⁴⁹ B Lange, 'Researching Discourse and Behaviour as Elements of Law in Action' in R Banakar and M Travers, 'Theory and Method in Socio-Legal Research' (Hart 2005) 175, 178. See also CF C Robson, *Real World Research* (3rd edn, Wiley 2011) 17.

⁵⁰ M Seneviratne, 'Researching Ombudsmen' in R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) 161, 169.

⁵¹ A list of the interviewees, their affiliation and the dates of the interviews is also available in Annex II.

⁵² Qualres, 'Semi-structured interviews' <www.qualres.org/HomeSemi-3629.html> accessed 1 February 2012.

The choice of a comparative law method

The purpose of this study is to identify flaws in employment racial equality legislation and policies, and find avenues to overcome them. In this regard, I have chosen to compare the legislation and policies of two EU Member States, Britain (within the UK) and Spain, as a valuable method to identify best practices which can then inspire the transformation of equivalent institutions in different legal systems.⁵³ This, however, does not necessarily mean that legal transplants are blindly endorsed.⁵⁴ The comparison is developed from a *functionalist perspective*, that is, the choice of legal institutions or policies compared has been made according to their *role* as tools to respond to a specific common problem.⁵⁵ Yet, 'functionally equivalent institutions are what they are because they reflect the structure of the legal and social system within which they exist'.⁵⁶ Accordingly, the functionalist perspective is combined with a *contextual analysis*, which takes into account legal, socio-cultural, economic, religious and political factors.

Although comparing Spanish and British law can be controversial because they respectively belong to the Civil Law and the Common Law families,⁵⁷ there are several reasons why this comparison can be both fruitful and possible –albeit challenging, at times. Firstly, it can be argued that, despite the obvious differences between these legal families, most EU countries share nowadays common legal values.⁵⁸ Also, EU law has had the effect of standardising national laws in some areas where the development of the former has been particularly prominent, as it is arguably the case with equality law. In this respect, EU equality law, which was

⁵³ E Orücü, 'Developing Comparative Law' in E Orücü and D Nelken (eds), *Comparative Law. A Handbook* (Hart 2010) 41, 55. See also S Fredman, *Discrimination Law* (2nd edn, OUP 2011) preface to the 2nd edn.

⁵⁴ See criticism in G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' 61 (1998) MLR 11; P Legrand, 'The Return of the Repressed: Moving Comparative Legal Studies Beyond Pleasure' (2001) 75 *Tulane Law Review* 1033.

⁵⁵ Orücü, 'Developing Comparative Law' (n 53) 51.

⁵⁶ *ibid* 53.

⁵⁷ See eg K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 68-69. Some argue that comparing Civil and Common Law systems is pointless because they represent 'irrevocably irreconcilable' approaches to law, P Legrand, 'Antivonbar' (2006) 1 *Journal of Comparative Law* 30, 31; see also R Cotterrell, 'Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity' in Orücü and Nelken (n 53) 133, 139.

⁵⁸ Cotterrell, *ibid* 140.

initially partially inspired by UK equality law,⁵⁹ has approximated British and Spanish law to the point of enabling a comparison between the two. Yet, this comparison is not only possible, but also desirable. British and Spanish equality law are at different stages of ‘maturity’ and they are experiencing different types of regulatory challenges. The British and Spanish legal systems have also different approaches towards (non) adjudicative procedures, collective bargaining and the role of equality bodies, which potentially increases the chances for identifying flaws and avenues to overcome them. For instance, whilst litigation rates have traditionally been high in Britain, in Spain they tend to be low; but high litigation rates are not necessarily better if success rates are low⁶⁰ and/or gaps between ethnic minorities and the majority are not overcome at group level. Last but not least, the fact that both countries belong to different legal systems means that the results of this investigation can be more wide-reaching because they can potentially be relevant to different countries and legal systems.

1.5 *Structure of the thesis*

The thesis is divided in two main parts: chapters 2, 3 and 4 develop the context for the comparison which is conducted in chapters 5, 6 and 7. Chapter 2 sets the theoretical scene by exploring several concepts of equality and theories on the use of rules. From these I derive the analytical framework, which then guides the comparison in the second part of the thesis. Chapter 3 sets the international and European context through the discussion of the standards laid down in the RED and the most relevant international conventions. Chapter 4 closes the first part by introducing the national context, that is, the evolution of British and Spanish equality law, and its current status and social environment.

The second part of the thesis takes a chronologically inverted order to conduct the comparison, starting with the discussion of ex-post enforcement, ie British and Spanish judicial procedures to enforce racial equality law. Chapter 5

⁵⁹ D Schiek, L Waddington and M Bell, ‘Introductory Chapter. A Comparative Perspective on Non-Discrimination Law’ in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007) 1, 5.

⁶⁰ In the UK, the success rate in employment racial discrimination claims in 2011-12 was 3%, as opposed to an average rate of 12%, see Ministry of Justice, ‘Employment Tribunals and EAT Statistics 2011-12’ <<https://www.gov.uk/government/statistics/employment-tribunal-and-employment-appeal-tribunal-statistics-gb>> accessed 15 January 2014, Table 2.

specifically focuses on three aspects: active legal standing, the burden of proof test, and remedies. Chapter 6 then draws the comparison between the role of filters (ie equality bodies, trade unions and NGOs) and ADR mechanisms, emphasising their potential to improve the effectiveness of racial equality legislation. Chapter 7 closes the comparative part by analysing British and Spanish employers' policies to prevent racial discrimination, focusing in particular on positive duties, voluntary initiatives and collective bargaining. Finally, Chapter 8 discusses the conclusions.

Chapter 2. Setting the path to analyse the effectiveness of EU Race Equality Law

2.1 Introduction

The purpose of the Race Equality Directive ('RED'),¹ according to article 1, 'is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment'.

A careful analysis of this provision indicates that the RED has two purposes. Its primary aim is not to *directly address* racial discrimination, but rather to 'lay down a *framework*'² to combat racial discrimination. Although the initial proposal of the Commission unequivocally stated that '[t]he purpose of this Directive is to put into effect in the Member States the principle of equal treatment',³ the current formulation was intentionally introduced at the Council, following some MS's reservations.⁴ Whilst this may seem an unimportant semantic change, it does make a difference, because laying down a *legal framework* does not necessarily imply ensuring that it is going bring results *in practice*; it is far less demanding than endeavouring to actively tackle racial discrimination. However, the secondary –but ultimate–⁵ purpose of that *framework* remains to *put into effect* in MS the principle of equal treatment.⁶ Hence, it seems that the short term aim of the RED was *harmonising* MS's racial equality laws along some basic lines, but in the long run, the RED was also conceived to produce *effects* in practice.

¹Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

² Author's italics.

³ Commission (EC), 'Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' COM/99/0566 final.

⁴ Council (EC), Interinstitutional File 99/0253 (CNS) SOC 209 JAI 64 (Brussels, 31 May 2000) n 7.

⁵ The wording of article 1 of the RED uses the expression '*with a view to* putting into effect', which suggests that this is a long term, and not an immediate aim. Although more direct expressions are used in other language versions (ie in Spanish, '*con el fin de*' and in Italian, '*al fine di*'), the language versions of the other two working languages of the EU institutions, ie French and German, are closer to the English wording, that is, they use the expressions '*en vue de mettre en oeuvre*' and '*im Hinblick auf*', respectively.

⁶ Emphasis added.

Nowadays, 14 years after the adoption of the RED, its 'harmonising potential' has been profusely analysed⁷ and a minimum harmonisation of MS's racial equality laws has arguably been achieved, despite the initial obstacles and delays in implementing the Directive.⁸ Nevertheless, what remains to be thoroughly evaluated is whether it has accomplished its secondary, long term, aim, ie 'putting into effect' the principle of equal treatment. Hence, the purpose of this thesis is to analyse the extent to which this has been achieved in Britain and Spain, with a view to identify the type of regulatory approaches, policies and actors which have boosted or hindered the effectiveness of racial equality law in Britain and Spain.

As a preliminary step for the comparative analysis, section 2.2 defines the working concept of effectiveness and section 2.3 discusses Instrumentalism and the Social Working of Law, as the two main theories which will frame the analysis. On this basis, section 2.4 exemplifies how this theoretical background applies to racial discrimination situations, which will be used to make the key distinction between *ex-ante* and *ex-post* effectiveness of racial equality law. These two 'sub-concepts' of effectiveness are the skeleton upon which the comparative analysis will be built in the second part of the thesis.

2.2 *The concept of effectiveness*

Analysing the effectiveness of the RED is a challenging undertaking, which requires, in the first place, defining the concept of effectiveness itself. As McCrudden has pointed out, '[a]ssessing whether a regulatory enforcement regime is effective may be problematic because the goal or goals pursued may be unclear or disputed, or because several different instrumental goals may be pursued at different times in different places'.⁹ We already identified in section 2.1 that the RED has two main purposes, firstly, laying down a minimal anti-discrimination law framework across MS, and secondly, putting into effect the principle of equal treatment. This suggests

⁷ See literature review in Ch 1, s 1.3.

⁸ See Commission (EC), 'Joint report on the application of Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation' COM(2014) 2 final.

⁹ C McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in S Fredman (ed), *Discrimination and Human Rights. The Case of Racism* (OUP 2001) 251, 252.

that from its very inception, the RED combines both a formal and a substantive approach to equality.

From a *formal perspective*, the RED simply seeks to ensure that MS's legislation prohibits direct and indirect discrimination, harassment and instruction to discriminate, so that at least *on paper*, 'all persons' are treated equally. This is in line with the Aristotelian concept of equality –*treating* like alike,¹⁰ which focuses on *treatment*, not on *results*.¹¹ Accordingly, the *outcomes* of decision-making processes and policies are not taken into account because it is not *real equality* that is being pursued, but rather '*procedural equality*'.¹² In this context, the study of the effectiveness of equality law is pointless because what matters is that individuals are *treated justly* according to their comparability,¹³ and not whether they are really able to access a right or a service in equal terms.

Consequently, this investigation focuses on the concept of effectiveness derived from the secondary purpose of the RED, namely, *putting into effect* the principle of equal treatment. This purpose suggests that, next to a formal approach to equality, the RED also seeks to achieve *substantive equality*. Although this purpose is often mildly expressed in the body of the Directive,¹⁴ it can be argued that the second part of article 1 of the RED calls MS upon to advance changes in social structures to ensure that ethnic minorities are not deprived from any opportunity as a result of their ethnic identity. This is what substantive equality is all about:¹⁵ going beyond the strict 'neutrality' and 'symmetrical approach'¹⁶ of formal equality

¹⁰ Aristotle, *Ethica Nicomachea*, 1131a-1131b (W Ross trans, 1925).

¹¹ B Hepple, 'The Aims of Equality Law' (2008) 61 CLP 1, 14.

¹² *ibid*.

¹³ For Aristotle the term 'just' is very close to the term 'equal' because 'what is just in distribution must be according to merit in some sense'. I am using this term in the Aristotelian sense of 'proportion'. See Aristotle (n 10) 1131a-1131b.

¹⁴ Ch 2, s 2.3.2.

¹⁵ On this concept, see further: S Fredman, *A Critical Review of the Concept of Equality in UK Anti-Discrimination Law* (Cambridge Centre for Public Law and Judge Institute of Management Studies 1999) 3.7-3.19; B Hepple and C Barnard, 'Substantive equality' (2000) 59 Cambridge Law Journal 562; D Schiek, L Waddington and M Bell, 'Introductory Chapter. A Comparative Perspective on Non-Discrimination Law' in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007) 1, 28.

¹⁶ M Bell, 'Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination' in G de Búrca and B de Witte (eds), *Social Rights in Europe*, (OUP 2005) 261, 268.

by introducing laws and policies to reach equality in practice and achieve social change.

For this reason, for the purposes of this study, the concept of effectiveness is based on the idea of substantive equality, and more precisely, on the analysis of how racial equality law and related policies *work in society*. Whilst other commentators have analysed the effectiveness of EU or equality law on the basis of theoretical¹⁷ or jurisprudential considerations,¹⁸ I combine doctrinal analysis with the analysis of the *social effects* of the law and related policies. Racial equality frameworks¹⁹ will thus be considered effective when, on the one hand, law and policies can *prevent* inequality and discrimination by removing obstacles and empowering ethnic minorities ex-ante and, on the other hand, when the consequences of discrimination are dealt with in a way which *minimises* moral, financial and time costs ex-post, especially for victims.²⁰

2.3 *The theoretical background: instrumentalism and the social working of law*

Having established a definition of effectiveness, the next sections discuss two theories relevant to the analysis of EU racial equality law, which will be used to build the framework that will be applied to evaluate and compare British and Spanish racial equality law.

2.3.1 **The instrumentalist perspective of social change**

The instrumentalist approach to social change is mainly the approach of a policy maker²¹ who seeks 'to modify the behaviour of those subject to regulation in

¹⁷ F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 MLR 19.

¹⁸ C McCrudden, 'The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements' (1993) 13 OJLS 320; P Nicolaides and M Geilmann, 'What is Effective Implementation of EU Law' 19 (2012) MJ 383, 396-397.

¹⁹ I will use the expression 'racial equality frameworks' to refer generally to both racial equality legislation and policies.

²⁰ At this respect, I agree with Bolzman and others in considering that 'a victim oriented perspective provides a better understanding of racist deeds, leading, in turn, to more accurate forms of intervention against racism', see C Bolzman and others, 'A Typology of Racist Violence: Implications for Comparative Research and Intervention' in J ter Wal and M Verkuyten (eds), *Comparative Perspectives on Racism* (Ashgate 2000) 233, 233.

²¹ J Griffiths, 'An introduction in eight propositions to the social working approach to legislation' in N Zeegers, W Witteveen and B van Klink (eds), *Social and Symbolic Effects of Legislation under the Rule of Law* (Studies in Political Science Vol 23, Edwin Mellen Press 2005) 7.

order to generate a desired outcome'.²² It is mainly a positivist approach²³ which conceives rules as 'social engineering'²⁴ tools. Legal change is thus considered the central mechanism to modify undesirable social behaviours or to lead conducts towards the ideal pattern.²⁵ Instrumentalists believe that 'social arrangements are susceptible to conscious human control' through law,²⁶ and rules are considered effective when they achieve policy-makers' goals.²⁷

However, it is widely acknowledged that passing legislation declaring discrimination unlawful is unlikely to eradicate discrimination *per se*.²⁸ As Griffiths points:

[n]o legal rule produces effects just because it is there. A legal rule, as it leaves the legislative body, is nothing more than so many black ink markings on paper. For it to have any social consequences, someone must do something with, or because of, the rule.²⁹

Indeed, whilst discrimination law fulfils an important symbolic value in terms of sending a message against racism and showing institutional disapproval towards discriminatory practices, as such, it is not enough for eradicating these types of conducts.³⁰

²² K Yeung, 'The Private Enforcement of Competition Law' in C McCrudden (ed), *Regulation and Deregulation. Policy and Practice in the Utilities and Financial Services Industries* (OUP 1999) 36, 79.

²³ R Banakar, *The Doorkeepers of the Law: A Socio-Legal Study of Ethnic Discrimination in Sweden* (Dartmouth 1998) 115. See also L M Friedman, *Law and Society: An Introduction* (Prentice-Hall 1977) 53.

²⁴ K A Ziegert, 'The Thick Description of Law' in R Banakar and M Travers (eds), *An Introduction to Law and Social Theory* (Hart 2002) 55, 65.

²⁵ J Morison, 'How to Change Things with Rules' in S Livingstone and J Morison (eds), *Law, Society and Change* (Dartmouth 1990) 3; D J Galligan, *Law in Modern Society* (Clarendon Law Series, OUP, Oxford 2007) 331.

²⁶ S F Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719, 719. See also Banakar (n 23) 115; Friedman (n 23) 53.

²⁷ J Black, 'Using Rules Effectively' in C McCrudden (ed), *Regulation and Deregulation* (OUP 1999) 95, 99.

²⁸ On the role of remedies and sanctions and their deterrent effect on anti-competitive conducts, see eg Yeung (n 22) 36, 37, 40-43.

²⁹ J Griffiths, 'Legal Pluralism and the Theory of Legislation – With Special Reference to the Regulation of Euthanasia' in H Petersen and H Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth 1995) 201, 213.

³⁰ In this respect see C McCrudden, 'Regulating Discrimination: Advice to a Legislator on Problems Regarding the Enforcement of Anti-Discrimination Law and Strategies to Overcome them' in T Loenen and P R Rodrigues (eds), *Non Discrimination Law: Comparative Perspectives* (Kluwer 1999) 295, 296-297; E Howard, 'The EU race directive: its symbolic value – its only value?' (2004) 6 *IJDL* 141-163.

Hence, following an instrumentalist logic, a statute prohibiting discrimination must be accompanied by appropriate enforcement measures³¹ because social actors will only change their behaviour if they perceive that the outcome is more rewarding than continuing with their former conduct.³² Accordingly, instrumentalism is largely based on enforcement through 'sticks'³³ (disincentives), for instance through individual remedies that enable victims' compensation or the imposition of sanctions. However, in many cases, even relying on these enforcement mechanisms, anti-discrimination law does not yield the expected effects because, from a psychological point of view, 'punishment, or its threat' are not necessarily the best means to persuade individuals to adjust their behaviour to the law.³⁴

Furthermore, disincentives based on legal definitions are likely to have limited effects because racism is such a complex phenomenon that it does not easily fit into formal legal concepts, so different aspects may need to be left aside to subsume the facts into the norm.³⁵ Indeed, racial discrimination events can be considered to be just one type of manifestation of racism, which has also other 'components' based on ideology, stereotypes, institutional discrimination and power relations between groups.³⁶

Nevertheless, as a complementary means to foster enforcement some instrumentalists have pointed out that 'carrots' (incentives) can also be useful.³⁷ McCrudden, for instance, suggests the use of group justice mechanisms, agencies

³¹ McCrudden adheres to this view and explains it from an economic perspective, comparing the lack of enforcement of anti-discrimination law to market failures, *ibid* 298.

³² As McCrudden has put it: 'organisations will only modify disapproved-of behaviour if faced with sufficient incentives. Where an organisation expects to benefit from infringing the law by continuing to act in a certain way, it is unlikely to change its behaviour unless the costs of doing so outweigh the anticipated benefits', *ibid*.

³³ Ellickson uses these terms for referring generally to remedial rules and enforcement mechanisms. See R Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard UP 1991) 207; see also Banakar (n 23) 114.

³⁴ L Lustgarten and J Edwards, 'Racial Inequality and the Limits of Law' in P Braham, A Rattansi and R Skellington (eds), *Racism and Antiracism: Inequalities, Opportunities and Policies* (SAGE Publications 1999) 278.

³⁵ Banakar (n 23) vii, 135; *ibid* 272.

³⁶ T A Van Dijk, 'Ideologies, Racism, Discourse: Debates on Immigration and Ethnic Issues' in J M Ter Wal and M Verkuyten (eds), *Comparative Perspectives on Racism* (Ashgate 2000) 91, 92-93; S Fredman, 'Combating Racism with Human Rights: The Right to Equality' in S Fredman (ed), *Combating Racism with Human Rights: The Right to Equality* (Collected courses of the Academy of European Law XI/1, OUP 2001) 9, 10-11.

³⁷ Lustgarten and Edwards (n 34) 278.

with bargaining powers, tax and financial benefits or public procurement.³⁸ To the extent that these mechanisms are used to address racism more comprehensively, they may be more effective than disincentives and they may play a greater part in preventing discrimination. For instance, positive action policies can be developed to tackle institutional discrimination, and equality bodies can put pressures on organisations to adopt redistributive actions in favour of vulnerable groups or launch awareness raising campaigns.³⁹ Still, if these incentives are designed by the policy-maker without taking into account social needs and values, they may suffer from the same flaws as instrumentalist disincentives.

2.3.2 The social-working of law: analysing equality law from a bottom-up perspective

The theory of the Social Working of Law was developed by Griffiths, a legal anthropologist, to explain rule-following and the social effects of legislation in different areas of life, including equality law.⁴⁰ Griffiths based his theory on the concept of 'semi-autonomous social fields' (SASFs), previously developed by Moore. According to the latter, law should be seen as a reflection of social practices and values, and not as an imposed external tool used to direct society.⁴¹ Moore organises society around the concept of SASFs, ie communities which 'can generate rules and customs and symbols internally' but are also permeable to rules emanating from their external environment.⁴² Hence, whilst each SASF has its internal organisation and its own rules, it can also be influenced by other SASFs.⁴³ For instance, a SASF can be a football team, a company, a gardening association or simply a family or a group of friends. Moore contends that law is a SASF that operates social change only when it modifies the way people interact with each other⁴⁴ (ie when it alters social actors 'bargaining positions').⁴⁵ Thus, to change relationships and make rules

³⁸ McCrudden, 'Regulating Discrimination' (n 30) 305. See also *ibid*, 278-280.

³⁹ McCrudden, *ibid* 305.

⁴⁰ See in general J Griffiths, 'The Social Working of Legal Rules' (2003) 48 *Journal of Legal Pluralism* 1; Griffiths, 'An introduction in eight propositions' (n 21); Griffiths, 'The Social Working of Anti-Discrimination Law' in Loenen and Rodrigues (n 30) 313.

⁴¹ S F Moore, *Law as a Process. An Anthropological Approach* (Routledge 1978) 244.

⁴² Moore, 'Law and Social Change' (n 26) 720.

⁴³ Banakar (n 23) 127.

⁴⁴ Moore, 'Law and Social Change' (n 26) 734.

⁴⁵ Banakar (n 23) 128.

effective, Moore argues that the legislator must take into account the social context of implementation, with its own patterns and informal norms.⁴⁶

Griffiths' theory of the Social Working of Law is based on the concept of the 'shop floor of social life',⁴⁷ which is composed by a set of SASFs –with their own internal rules, which can, nevertheless, be influenced by other communities' rules.⁴⁸ By focusing on the shop-floor, the social working of law studies how anonymous individuals choose to make use of the law in their daily decisions⁴⁹ or to face legal conflicts,⁵⁰ if any.

The analysis of rule-following from a bottom-up perspective led Griffiths to distinguish between three different types of uses of rules.⁵¹ Right at the bottom he identified *informal uses* of rules, which take place when individuals apply rules spontaneously in their everyday relationships. They apply rules because they match their social and moral values or because they have 'internalised' them, even if they do not match their 'inner convictions'.⁵² Once they know about the existence of a rule, it will affect social actors' behaviour, who will also build expectations about their counterparts' actions.⁵³ If a conflict arises, individuals may use a rule to solve it internally through negotiation, according to their respective bargaining powers.⁵⁴

A second category are *organisational uses*, which take place within private and public organisations, that is, SASFs which take the form of a legal person. For instance, companies incorporate legal developments to their internal policies by adjusting their recruitment procedures to anti-discrimination law.⁵⁵ However, it is usually easier to do it for large or publicly-owned companies than for SMEs because they tend to have human resources and/or compliance departments, which follow

⁴⁶ Moore, 'Law and Social Change' (n 26) 742.

⁴⁷ He defines it as 'the place where the activities which the legislator would regulate are taking place', Griffiths, 'Legal Pluralism and the Theory of Legislation – With Special Reference to the Regulation of Euthanasia' in H Petersen and H Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Darmouth 1995) 201, 208.

⁴⁸ Moore (n 26) 720.

⁴⁹ *ibid* 214.

⁵⁰ Griffiths, 'The Social Working of Anti-Discrimination Law' (n 40) 319.

⁵¹ *ibid*.

⁵² M Galanter, 'The perplexities of legal effectiveness' in Zeegers, Witteveen and van Klink (n 21) XVII.

⁵³ *ibid* 320.

⁵⁴ At this respect, see also Banakar (n 23) 128.

⁵⁵ Griffiths, 'The Social Working of Anti-Discrimination Law' (n 40) 320.

legal developments and implement them internally.⁵⁶ Organisational uses of rules can either refer to the implementation of rules within an organisation or to the resolution of disputes internally within the SASF, by bringing the matter before the relevant authority within that organisation.

Finally, the last category consists of uses of rules through alternative dispute resolution mechanisms or through *complaints and litigation* before administrative or judicial authorities. This is usually the only use which is considered in statistics and official reports. It refers both to *ex officio* enforcement (ie claims which are brought at the initiative of legal officials) or private enforcement at the initiative of victims or interest organisations.⁵⁷

According to Griffiths, these three types of uses need at least three preconditions to take place (see Figure 1). First of all, rules must *answer citizens' needs* because they will only use them 'when they have a reason to do so'.⁵⁸ Contrary to instrumentalist approaches which fail to take into account social needs,⁵⁹ and tend to address gaps between law and reality⁶⁰ through a spiral of legal reform which may lead to overregulation and fragmentation,⁶¹ the Social Working of Law suggests that the effects of rules should be observed from an inverted –bottom-up– perspective, taking potential users as the starting point.⁶² Accordingly, law drafters should pay more attention to the shop floor of social life because the use of rules depends to a great extent on whether they are adapted to its needs⁶³ and social values.

⁵⁶ FRA, *The Race Equality Directive. Application and Challenges* (OPEU 2012) 20. An empirical study conducted in the Netherlands confirmed that public organisations incorporate equal treatment legislation better than private ones, and large organisations better than smaller ones, see T Havinga, 'The effects and limits of anti-discrimination law in the Netherlands' [2002] *International Journal of the Sociology of Law* 75, 86.

⁵⁷ In some countries, collective claims and active legal standing for legal entities may also be allowed.

⁵⁸ Griffiths, 'The Social Working of Anti-Discrimination Law' (n 40) 321.

⁵⁹ *ibid* 314.

⁶⁰ B Hoffman, 'Minding the Gap: Legal Ideals and Strategic Action in State Legislative Hearings' (2008) 33 *Law & Social Inquiry* 89, 90.

⁶¹ M Galanter, 'Why the "haves" come out ahead: speculations on the limits of legal change' (1975) 9 *Law & Society Review* 149; R A Kagan, 'What Socio-Legal Scholars Should Do When There is Too Much Law to Study' (1995) 22 *Journal of Law & Society* 140, 141.

⁶² Griffiths, 'The Social Working of Anti-Discrimination Law' (n 40) 315.

⁶³ *ibid* 316.

Changing the relative bargaining power of individuals and groups is an example of the kind of social needs which should be addressed by equality law and policies. According to Moore:

[M]any laws are made operative when people inside the affected social field are in a position to threaten to press for enforcement. They must be aware of their rights and sufficiently organized and independent to reach and mobilize the coercive force of government in order to have this effect.⁶⁴

However, informal advantages accumulated over years by certain social groups are very difficult to change with legislation. For this reason, 'newly acquired formal "equality" of opportunity brought into existence by legislation is often not in fact equal to long held social positions'.⁶⁵ For instance, formal prohibitions of discrimination are unlikely to tackle effectively institutional discrimination suffered for centuries by Roma –even if redress mechanisms are provided– because a formal prohibition does not address the structural disadvantages accumulated by the Roma community. On the other hand, however, legal reform can be a first step to create the conditions which may eventually lead to adjusting bargaining powers.⁶⁶

A second key element for the use of rules is *information and communication* to potential users. In general, social actors do not know all the law; they just know the law which is relevant to them. 'Knowledge of law [...] is not spread evenly in society'⁶⁷ because it depends largely on the particular circumstances of each individual (economic activity, age, social class, civil status, etc). Yet, citizens need to know about the existence of the norm, its contents and how it can be relevant to their particular situation to adjust their 'legal behaviour'.⁶⁸ So how to spread legal knowledge? This function is often accomplished by mass media through a transmission process that implies both simplification and distortion so that non-legal experts can understand the essence of the rule.⁶⁹ The simplification process is important to 'translate' complicated legal expressions into normal language, but crucial information can also be lost on the way. As a result, legal changes may be

⁶⁴ Moore, 'Law and Social Change' (n 26) 744.

⁶⁵ *ibid* 741.

⁶⁶ *ibid*.

⁶⁷ Friedman (n 23) 114-115.

⁶⁸ *ibid* 111-115.

⁶⁹ T Makkonen, 'Equal in Law, Unequal in Fact: Racial and ethnic discrimination and the legal response thereto in Europe' (PhD thesis, University of Helsinki 2010) 281. See also Griffiths, 'The Social Working of Legal Rules' (n 40) 18.

difficult to perceive by ordinary citizens; legislation may be ‘dense’⁷⁰ or technically complex. For instance, differences between an amended act and the original one may be very subtle, so potential users may not see the difference in practice because it has been ironed out in the transmission process. Hence, raising legal awareness and promoting a better understanding of the law is key for increasing access to justice in equality law, especially when it is complex and very fragmented.⁷¹

Thirdly, besides knowing the rule, *potential users must be able to recognise the situation* in which they can make use of it. For this purpose, they need to have the relevant information (ie that they were not accepted for a job due to their ethnicity) and they must interpret it as the information which is relevant for using the rule. In the same way that consumers may ‘fail to recognize that the product they receive is defective’,⁷² discrimination victims may fail to identify that they were not hired due to their foreign accent or their skin colour.⁷³

These three preconditions are applicable to the three types of uses of rules, but the more ‘sophisticated’ a use is, the more barriers there are for individuals to put it in place. For this reason, more preconditions are needed to pass from an informal to an organisational use, and even more to start an active enforcement of the law by filing a complaint (see Figure 1). Hence, among the three types of uses of rules, informal uses are the ones which are quantitatively more important because they can take place at any moment, sometimes even in an unconscious way. Organisational uses are also quantitatively significant but not as much as informal uses, as they require implementation procedures which may involve the participation of different persons and departments and may raise organisational costs. Finally, complaints and litigation are likely to have a relatively low relevance because they imply high costs in terms of time, money and social relations, which often detract individuals from starting legal actions.⁷⁴ Still, complaints and litigation are necessary *ex post* mechanisms to ensure that when the application of anti-

⁷⁰ Friedman (n 23) 114.

⁷¹ FRA, *Access to Justice in Europe: an Overview of Challenges and Opportunities* (OPEU 2011) 43.

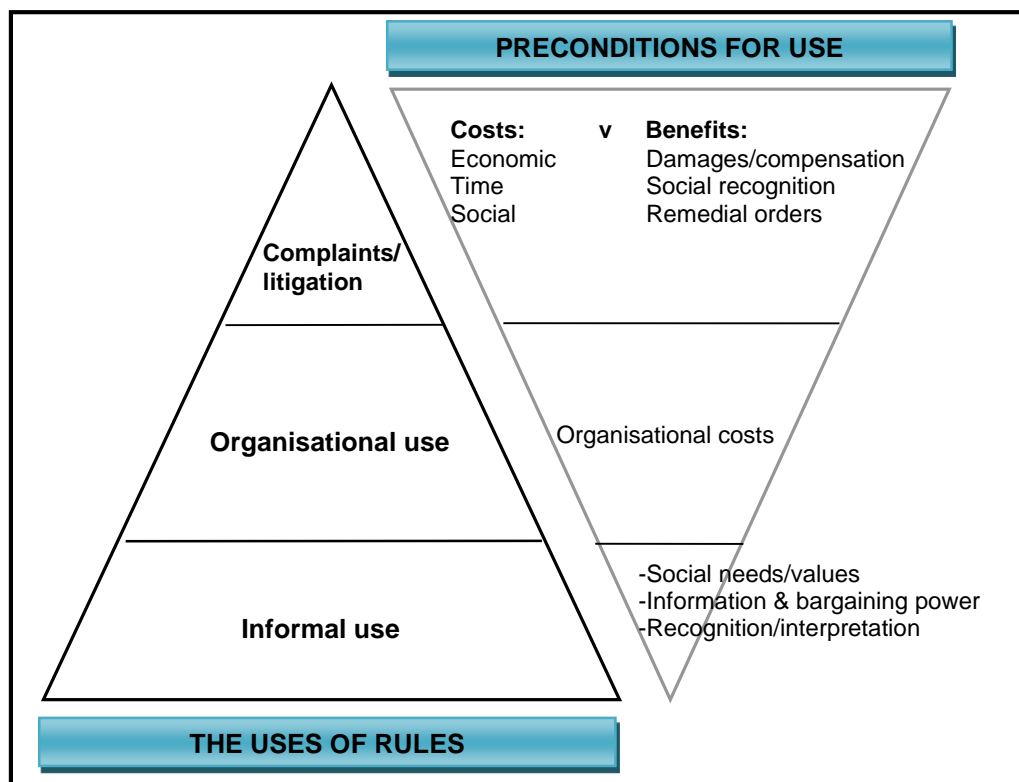
⁷² S Macaulay, ‘Lawyers and Consumer Protection Laws’ (1979) 14 *Law & Society Review* 115, 121.

⁷³ A FRA report has identified this as a problem in the application the RED. See FRA, *The Race Equality Directive* (n 56) 20.

⁷⁴ Griffiths, ‘The Social Working of Anti-Discrimination Law’ (n 40) 325.

discrimination law at informal and organisational levels fails, victims have legal devices to seek reparation and perpetrators can be sanctioned.

Figure 1. Types of uses of rules and preconditions for use.



Source: own elaboration.

2.3.3 Which theoretical approach for the study of the effectiveness of EU racial equality law?

The theoretical approach of this thesis is based both on Instrumentalism and the Social Working of Law because these two theories, rather than being mutually exclusive, complement each other. On the one hand, Instrumentalism is a regulatory approach which seeks to enact *effective legislation* which contributes to the attainment of previously set objectives; on the other, the Social Working of Law analyses the *uses of rules* and the *social effects* of legislation, without judging whether legislation is effective or not.⁷⁵ Whilst the *aim* of this research project is essentially instrumentalist, that is, it looks at whether race equality legislation is *effective* or not; the *strategy* followed to analyse that is based on the Social Working

⁷⁵ Griffiths, 'An introduction in eight propositions' (n 21) 8.

of Law and explores how racial equality rules are *used in practice* and how social actors interact.

Although the combination of both approaches might seem surprising for some,⁷⁶ it seems logical to base a study on the effectiveness of racial equality law not only on doctrinal analysis and litigation statistics, but also on the social effects that it produces. By only looking at complaints' statistics, effectiveness could be considered high in Britain, due to generally high litigation employment discrimination rates, and very low in Spain, due to the low litigation rates.⁷⁷ Yet, litigation rates only give an idea of the number of times the law was breached, and still, not about the total number, because many victims do not bring any claim.⁷⁸ In addition, the fact that claims are brought does not mean that they are won and does not mean either that institutional discrimination and gaps between minorities and the majority are being overcome.⁷⁹ Accordingly, we must take into account the needs and behaviour of social actors and how they use the law and other bargaining tools in their interaction.

As opposed to the strong *positivism* which embeds the instrumentalist approach –which conceives the 'law' as the main source of social control, the Social Working of Law is based on *legal pluralism*.⁸⁰ Hence, the Social Working of Law acknowledges that there are different sources of 'law' and different forms of social control, which may be institutionalised or not, and which may derive from different actors. For this reason, the analysis does not only focus on the comparison of British and Spanish formal enforcement mechanisms, but also on the role played by Alternative Dispute Resolution ('ADR') mechanisms, equality bodies, NGOs, social

⁷⁶ Whilst some of Griffiths' works seem to present instrumentalism as a theory totally opposed to the Social Working of Law (see Griffiths, 'The Social Working of Anti-Discrimination Law' (n 40)), a more careful analysis shows that they are not incompatible. In fact, Griffiths has recognised that 'these different sorts of approaches can be and often are related to one another: one can study law empirically for normatively inspired reasons, and a good social engineer takes account of empirical data and theory about law just as he might take account of any other sort of technical information', see 'An introduction in eight propositions', *ibid* 8.

⁷⁷ See Ch 4.

⁷⁸ See eg FRA, *The Race Equality Directive* (n 56) 20-21; Equinet, *Tackling the "Know Unknown". How Equality Bodies Can Address Under-Reporting of Discrimination through Communications* (Equinet 2012) 9-11.

⁷⁹ Several reports and authors have pointed that individual litigation cannot tackle historical problems of segregation and discrimination of certain groups because they generally only have impact on the case at stake. See eg FRA, *The Racial Equality Directive* (n 56) 22.

⁸⁰ Griffiths, 'An introduction in eight propositions' (n 21) 9.

partners and businesses' policies to address discrimination, and how these elements interact.⁸¹

The Social Working of Law also brings attention to informal and organisational uses of rules, which, despite being quantitatively more important, are normally not taken into account by instrumentalist perspectives. Nevertheless, as Annex 3 shows, informal and organisational uses of rules cannot always prevent conflicts or provide acceptable solutions when conflicts arise. It is thus crucial to take into account formal uses of rules, whilst at the same time incorporating informal and organisational uses to the analysis.

Therefore, whilst the *aim* of this thesis is rooted on an instrumentalist logic, the *analysis* is mainly conducted through the lens of the Social Working of Law. For this purpose, the next sections elaborate further the analytical framework which underlies the comparative chapters.

2.4 The effectiveness of racial equality law through the lens of the Social Working of Law

2.4.1 How does racial discrimination operate in society? Analysis through an example

Following Griffith's theory, this section reproduces: (1) the use of equality rules by individuals in a context of ethnic diversity and potential discrimination conflict, and (2) the decision-making processes of a victim of discrimination. The aim of this exercise is to uncover the main obstacles for putting into effect racial equality law *in abstracto*, so the analysis can then focus on how those issues are dealt with *in practice* in Britain and Spain in the comparative chapters.

Consider the situation of A, a young Roma graduate, who has been unsuccessfully looking for a job for months. She may have trouble finding a position due to her lack of experience, but it may also be due to prejudices against Roma and institutional discrimination. Eventually, thanks to a corporate programme to

⁸¹ Mason also emphasises the role of 'those actors to whom the directive has delegated tasks', see L. Mason, 'The Hollow Legal Shell of European Race Discrimination Policy: The EC Race Directive' (2010) 53 *American Behavioural Scientist* 1731, 1745.

promote the integration of underrepresented ethnic minorities, she is selected for a position of sales advisor, among other equally qualified candidates.

At the outset, equality law is voluntarily followed by the retail store director, who hires A (organisational use), and it is also followed by A's colleagues, who – unconsciously or not – treat her just as another employee (informal use). However, after some time another sales advisor, B, discovers that A is a Roma and starts harassing her through constant disparaging comments and jokes about the Roma community. In that case, A has several 'choices'. As first possibility would be trying to deal with the problem internally, 'negotiating' with B, for instance by reminding B that harassment is unlawful and threatening B with reporting that conduct to the director. Depending on the relative bargaining power of A and B, A will be able to persuade B to cease his conduct and they will reach an 'amicable adjustment'. However, A's relative bargaining power may be low, so she may choose not to take action; or she may take action but not reach any amicable solution, in whichever case A may choose just to cope with the problem. In these circumstances, discrimination may never be reported.⁸²

Alternatively, A may seek the intervention of a third party within their SASF. In that case, A could report the problem to the director of the retail store. It is at this point that the 'dispute' starts to be visible for third parties. The director may either avoid the problem, or deal directly with it by applying the company's internal code of conduct and opening an internal grievance procedure –if it exists.

So far, the example illustrates that victims of discrimination can choose between taking action or what Felstiner calls 'lumping', that is, avoiding and/or ignoring the legal problem.⁸³ Victims often prefer lumping or exit strategies⁸⁴ because they may be influenced by their inner beliefs,⁸⁵ or by external factors arising within or outside the SASF, such as fear of victimisation, lack of confidence

⁸² However, in some cases, if victims are in touch with an interest organisation, the latter may be able to spot the conflict and have a 'pull effect' so that victims eventually report discrimination.

⁸³ W L F Felstiner, 'Influences of Social Organization on Dispute Processing' (1974) 9 *Law & Society Review* 63, 81.

⁸⁴ Griffiths, 'The Social Working of Anti-Discrimination Law' (n 40) 325.

⁸⁵ Some victims believe that they do not need help, they do not want it; others perceive the incident as too trivial to be reported, see eg Equinet (n 78) 9-11.

in the legal system, language barriers, etc.⁸⁶ They may also be influenced by the feeling that it is not socially expected that they take action against discrimination.⁸⁷ I will refer to all these avoidance strategies as ‘social lumping’.

If instead of lumping the victim tries to solve the problem internally with the aggressor or brings the matter before a SASF authority but the internal claim within the company is not successful, the victim may choose again between social lumping or seeking the intervention of an external third party. Depending on the information available to the victim and her bargaining power, she may choose to go for advice to a third party (‘filters’) within the SASF where discrimination occurred (ie trade unions) or external to the SASF (ie legal professionals, NGOs, equality bodies, or other advice providers).⁸⁸ However, in some cases, it is not the victim who takes the initiative to contact filters, but rather the other way round. For instance, NGOs may be able to persuade victims to bring a claim because they are trusted by the ethnic communities they have regular contact with.⁸⁹ Also, some British law firms have actively searched for potential claimants to bring discrimination claims –mainly equal pay cases– on a ‘no win, no fee’ basis.⁹⁰ Overall, the influence of filters on victims’ decisions⁹¹ to report discrimination (or not) emerges from a recent survey, where one third of respondents sought advice from legal experts *before* taking formal action and among them, ‘two thirds had received legal advice *by the time* they lodged their complaints’.⁹²

Having consulted filters or not, the victim may choose to deal with the conflict through a non-adjudicative procedure, eg through an Alternative Dispute Resolution (ADR) mechanism. Alternatively, parties may also decide to try ADR when judicial proceedings are already pending because they may see a chance to succeed ‘when

⁸⁶ For more details see FRA, *EU-Midis. Main Results Report* (FRA 2009) 54-56.

⁸⁷ FRA, *Access to Justice in Cases of Discrimination in the EU. Steps to further Equality* (OPEU 2012) 55.

⁸⁸ For a similar approach and examples on the role of filters in discrimination disputes in several MS, see *ibid*.

⁸⁹ Interview with Sara Giménez Giménez, Lawyer, Equality Director at FSG (Huesca, Spain, 23 April 2013).

⁹⁰ See eg M Berry, ‘No win no fee’ lawyers face tighter controls in equal pay disputes’ *Personnel Today* (30 June 2008) <www.personneltoday.com/hr/no-win-no-fee-lawyers-face-tighter-controls-in-equal-pay-disputes/> accessed 3 July 2014; D Renton, *Struck Out. Why Employment Tribunals Fail Workers and What Can be Done* (PlutoPress 2012) 62-68.

⁹¹ H Glenn, *Paths to Justice. What People Do and Think about Going to Law* (OUP 1999) 77.

⁹² FRA, *Access to Justice in Cases of Discrimination in the EU* (n 87) 50.

all other approaches ha[ve] failed' or are likely to.⁹³ The advantage of non-adjudicative ADR systems (eg mediation and conciliation) is that the parties still 'own' the dispute, as it is up to them to reach an agreement, and they may find a more speedy, flexible and restorative solution. However, ADR systems have also the risks of, *inter alia*, deviating key cases from public scrutiny or 'leaving justice undone'.⁹⁴

Hence, instead of trying ADR –or afterwards, if ADR is unsuccessful– the victim may decide to start an administrative complaint before an equality body. Alternatively, she may bring a claim before an employment tribunal, or she may decide not to take further legal actions.

Going back to the example, if A eventually takes legal action, either through an administrative or a judicial procedure, she may encounter institutional and systemic barriers to pursue effectively her actions. In fact, lumping can be a product of the legal system itself due to three main reasons. Firstly, by deciding if a case is legally relevant or not, filters play a 'screening' role.⁹⁵ The most obvious example is lawyers' discretion in deciding whether they take a case or not,⁹⁶ but there are other examples. For instance, the British Equality and Human Rights Commission (EHRC) policy to pick up the cases in which it exercises its litigation powers according to its strategic priorities,⁹⁷ or judges' discretion to shift the burden of proof to the respondent. Accordingly, equality bodies, judges and other legal actors may act as 'doorkeepers' of the legal system when they select the cases which can enter the legal system.⁹⁸

Secondly, lumping may also be the consequence of legal barriers to access a procedure, due to restrictive standing rules or short time limits to bring a claim. For instance, victims may not be willing to start formal complaints on their own, but may

⁹³ R Ridley-Duff and A Benett, 'Towards mediation: developing a theoretical framework to understand alternative dispute resolution' (2011) 42 *Industrial Relations Journal* 106.

⁹⁴ O M Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073, 1085. See further Ch 5.

⁹⁵ R L Sandefur, 'The Fulcrum Point of Equal Access to Justice: Legal and Non-Legal Institutions of Remedy' (2008) 42 *Loyola of Los Angeles Law Review* 949, 957.

⁹⁶ See eg R Moorhead, 'An American Future? Contingency Fees, Claims Explosions and Evidence from Employment Tribunals' (2010) 75 *MLR* 752, 770-774.

⁹⁷ EHRC, 'Strategic litigation policy 2012-13. Appendix 2'

<<http://www.equalityhumanrights.com/legal-and-policy/legal-strategy/>> accessed 20 August 2013. See also Banakar (n 23) 30-31 regarding Swedish Ombudsmen.

⁹⁸ *ibid* 30.

feel encouraged to do so as a group, with other victims in the same situation, or if a support organisation files the complaint in their name, but these options may not be allowed in the relevant legal system.

Thirdly, some forms of discrimination are more subtle or complex and may not fit into the tests developed by administrative and judicial authorities to apply the law to the facts of a case. Sperino points that the ‘frameworks’ (ie multi-part tests) used for evaluating the facts of a discrimination claim ‘are overly influenced by [...] the specific cases through which they were developed and are resistant to change’.⁹⁹ If we bear in mind that forms of discrimination have evolved over time from overt actions, like direct discrimination, to more subtle actions,¹⁰⁰ like harassment, ‘the inflexibility of the framework model makes it unable to account for the full manifestations of discrimination’.¹⁰¹ For this reason, claimants may struggle to subsume the facts of their cases into a recognised structure, which may lead ‘courts to dismiss claims that straddle more than one framework or that do not fit neatly within recognized structures’.¹⁰² For instance, victims may struggle to put forward sufficient evidence to shift the burden of proof to the respondent, and the court itself may have difficulties in finding the appropriate comparator in a novel case. Consequently, formal structures may impede victims’ access to formal procedures if they are not successful in reframing their cases following the patterns and the language of discrimination tests. I will refer to this phenomenon and to the ‘screening role’ of filters as ‘*institutional lumping*’ because, in contrast with social lumping, it does not arise from the social environment, but from the institutional framework itself.

Finally, the victim may be able to access administrative or judicial procedures and persuade the adjudicating body of the merits of the claim. However, whatever remedies are awarded, they will hardly compensate for all the moral, financial and

⁹⁹ S F Sperino, ‘Rethinking Discrimination Law’ (2011-2012) 110 Michigan Law Review 69, 70.

¹⁰⁰ *ibid*, 125; S Sturm, ‘Second Generation Employment Discrimination: A structural Approach’ (2001) 101 Columbia Law Review 458.

¹⁰¹ Sperino (n 99) 125.

¹⁰² *ibid* 71; cf with Banakar’s concept of ‘re-labelling’ (n 23) 85-86, 100. Both Sperino and Banakar seem to suggest that these processes are ‘doorkeeping techniques’ which end up framing how formal action against discrimination works and condition which cases enter the legal system.

time costs suffered by the victim, which highlights that, overall, preventing discrimination is more effective than addressing it a posteriori.

2.4.2 The distinction between ex-ante and ex-post effectiveness

Following this analysis, the definition of *effectiveness* will be divided into two categories. I will refer to ex-ante effectiveness to evaluate the extent to which different national rules and actors interact spontaneously respecting racial equality (see Annex 3). *Ex-ante effectiveness* relates mainly to informal and organisational uses of rules, so when individuals voluntarily apply the law in their private relationships or when organisations take the necessary steps to enforce the law internally, it can be considered that a race equality framework is effective ex-ante. Following Griffiths, this depends on three main factors: (1) awareness about racial equality law within a SASF and ability to recognise discrimination; (2) whether SASF's social values and needs match the values of racial equality legislation¹⁰³ (ie even unaware social actors may apply the law because it follows their social and moral beliefs or it meets its particular circumstances) and (3) the existence of legal and social (dis)incentives to persuade individuals within the SASF to act in line with racial equality law. At this respect, ex-ante effectiveness can be understood as the application of the law by individuals in their private relationships or within organisations, consciously or unconsciously, but in any event, without the intervention of any authority or without having recourse to formal legal procedures.

At the ex-ante stage, if informal and organisational rules are used in an effective way, institutional discrimination and episodic events of discrimination will arguably not exist or be minimal. For this purpose, tools like positive duties or positive action measures have been used in several jurisdictions as incentives to promote ex-ante effectiveness.¹⁰⁴ However, when individuals are unaware of the law, the law clashes with SASFs' internal values, or individuals are not given enough (dis)incentives to abide by the law, discrimination emerges. The most obvious form of discrimination will be episodic events, like the example analysed in section 2.4.1, but there can also be ongoing institutional discrimination towards certain groups,

¹⁰³ See eg Mason (n 81) 1737-1738.

¹⁰⁴ See eg S Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) ML 369; Makkonen (n 69) 257-260.

which may only materialise after years of subtle repetitive behaviour. For instance, that could be the case with an industrial company where most of the unqualified and low-paid staff have an Indian-Pakistani background, whilst most of the white collar staff have a white background.

Once discrimination emerges, whatever the form, I will refer to ex-post effectiveness (see Annex 3). In that case, the focus is not any longer on the uses of rules which can *prevent* it, but rather on the uses of rules which can *minimise the undesirable effects* of discrimination, especially for the victim. As discussed earlier, in the event of discrimination, the victim has the ‘choice’¹⁰⁵ between taking action or not (lumping). When victims’ actions simply consist in addressing the aggressor and negotiating, the conflict remains within the parties’ internal sphere. However, victims may also choose to seek the advice or the intervention of a third party, either within the SASF (eg the director or a trade union) or with an external third party, like an NGO or a barrister. In those cases, victims will probably be seeking information on the possibility of accessing structured legal procedures or they may be directly filing a complaint or bringing a claim before a relevant competent authority. At this stage, it is still possible to identify informal uses of rules (eg when the parties try to bargain on their own), organisational uses (eg when they try to solve the conflict through the SASF’s authority) and formal uses (eg when they start consulting filters about the possibility of initiating structured institutional procedures), but all three types of uses may not necessarily be present.

2.5 Conclusion

As the theoretical framework discussed in this chapter has demonstrated, ex-ante and ex-post effects of racial equality legislation and policies are both crucial to prevent or remedy racial discrimination. Whilst prevention seems even more important to increase the effectiveness of racial equality frameworks than a posteriori remedies, ex-ante effectiveness is generally more difficult to measure because it can happen inadvertently (ie individuals may observe the law unconsciously). In turn, someone may believe that discrimination is wrong but may

¹⁰⁵ I use the word ‘choice’ because the decision depends on the victim, but in my view it is often not a *free* choice backed by all the necessary information, due to unawareness of the law, fear to retaliation, etc, see eg FRA, *The Racial Equality Directive* (n 56) 19-21.

instinctively discriminate. In other situations, citizens and organisations will apply the law deliberately, no matter their moral beliefs, due to the existence of legal incentives or sanctions. Hence, the analysis of ex-ante effectiveness may sometimes be a sociological or psychological issue, rather than a legal one. This thesis endeavours to draw attention on the importance of the ex-ante effects of racial equality legislation and policies, but it does not attempt to conduct a profound analysis on the matter, which would require a comprehensive reliance on interdisciplinary and empirical tools. On the contrary, ex-post effectiveness is closely related to complaints and legal procedures, and it is easier to evaluate through both a classical doctrinal analysis and litigation statistics.

For these reasons, the comparative part of the thesis takes a chronologically inverted order, and starts off with the more straightforward analysis of formal enforcement mechanisms. After introducing the key aspects of the British and Spanish equality legislation (Chapter 4), it first focuses on three potential obstacles to ex-post effectiveness, namely, legal standing, the burden of proof and remedies (Chapter 5).

The analysis then concentrates on some actors and procedures which have attracted less attention from anti-discrimination law scholars but can be determinant for increasing ex-post effectiveness, that is, filters –mainly, equality bodies, NGOs and trade unions– and ADR procedures (Chapter 6).

Finally, the last comparative chapter focuses on the more elusive concept of ex-ante effectiveness. For this purpose, due to space and methodological constraints, I have chosen to compare three specific mechanisms which can positively affect employers' racial equality policies, namely, positive duties, collective bargaining and businesses' initiatives (Chapter 7).

However, before starting with the comparative analysis, Chapter 3 will briefly explore the international standards which inspire the contents of the RED and its interpretation, as well as the RED's potential to promote effective racial equality legislation at national level.

Chapter 3. Assessing the RED: pure symbolism or driver for effective legislation?

3.1 Introduction

Chapter 2 discussed the theoretical background upon which the comparison of the British and Spanish race equality frameworks will be based. Yet, before analysing the frameworks developed at national level, it seems crucial to determine whether the domestic measures which will be later considered have developed *thanks* to the RED, or *in spite of* the RED. Interestingly, when it was adopted, the RED was mostly welcome both as a strong message against racism and as a key tool to fight racism across the EU.¹ However, more than a decade after its adoption, some scholars have expressed scepticism about the potential of EU equality law, in general,² and about the capacity of the RED, in particular,³ to promote effective legislation.

Hence, the purpose of this chapter is to provide a better understanding of the roots of the RED, its wording and the institutional framework under which it was adopted, to then evaluate whether it can trigger effective national legislation *on its own*. Depending on the outcome of this evaluation, the focus of the comparative chapters will be more oriented to analysing compliance with the RED or to analysing the measures which Britain and Spain have developed of their own to promote change.

The chapter starts by briefly recalling the main international and European standards, which inspired the drafting of the RED and currently instil its interpretation (section 2.2.1). Section 2.2.2 then analyses the standards of the RED against the context of the international ones and section 2.2.3 discusses whether international and EU racial equality legislation have purely symbolic aspirations or aim to promote effective domestic measures. Finally, section 2.3 identifies the RED limits to promote effective legislation.

¹ See eg E Howard, 'The EU Race Directive: Its Symbolic Value — Its Only Value?' (2004) 6 IJDL 141.

² A Somek, *Engineering Equality. An Essay on European Anti-Discrimination Law* (OUP 2011).

³ Mason (n 81) 1731.

3.2 *Formal international and European standards*

3.2.1 International standards as a source of inspiration and interpretation for EU equality law

As article 19(1) of the Treaty of the European Union ('TEU') points, EU legislation must be interpreted and applied in accordance with '*the law*', which includes international law. Indeed, the CJEU has vehemently recalled that EU 'legislation must, so far as possible, be interpreted in a manner that is consistent with international law'.⁴ For our purposes, the relevant international law is mentioned in the preamble of the RED,⁵ which refers to the Universal Declaration of Human rights ('UDHR'),⁶ the International Convention on the Elimination of all forms of Racial Discrimination ('ICERD'),⁷ the International Covenant on Civil and Political Rights ('ICCPR')⁸ and the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').⁹ The RED also recalls that '[t]he right to equality before the law and protection against discrimination' is a *universal* right¹⁰ and that all MS are signatories of these treaties.¹¹ Hence, the enforcement standards laid down in the ICERD, the ICCPR and the ECHR, as well as the respective recommendations and soft-law emanating from their bodies¹² (hereinafter referred to as 'Human Rights Systems'), should be a source of inspiration for EU Member

⁴ Case C-456/06 *Peek & Cloppenburg v Cassina* [2008] ECR I-2731, para 30. See also Cases C-341/95 *Gianni Bettati v Safety Hi-Tech Srl* [1998] ECR I-4355, para 20; C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECR I-11519, para 35.

⁵ Recital 3.

⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

⁷ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.

⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, adopted 4 November 1950) (European Convention of Human Rights, as amended).

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Mainly, recommendations from the UN Committee on the Elimination of Racism and Discrimination ('CERD'), the UN Human Rights Committee ('HRC'), the European Commission against Racism and Intolerance ('ECRI') and the following documents: OHCHR, 'Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination' (1996) UN doc HR/PUB/96/2 ('Model Legislation'); OHCHR, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2006) UN Doc A/RES/60/147 ('Basic Principles'); OHCHR, 'Preparatory Meetings for the World Conference Against Racial Discrimination, Xenophobia and Related Intolerance' (2000) UN Doc A/CONF.189/PC.1/8 ('Preparatory Meetings').

States ('MS') in the interpretation and implementation of the RED. This section outlines the main principles deriving from them.¹³

The first and most basic element that all human rights systems require is making review procedures available to victims of racial discrimination. Whilst they generally allow the choice between judicial or administrative procedures¹⁴ and they acknowledge the potential of alternative dispute resolution,¹⁵ the HRC and the European Court of Human Rights ('ECtHR') have expressed preferences for judicial procedures.¹⁶ However, they are inflexible regarding the independence and impartiality of the body hearing the case,¹⁷ and the binding nature of its decisions,¹⁸ which they require almost unanimously.

Nevertheless, these systems also acknowledge that the mere existence of these procedures is necessary but not sufficient to redress victims. Certainly, many victims are unaware of the legal avenues to enforce their rights, and even being aware, they often face social, financial and time barriers to actually activate the relevant procedures. For this reason, Human Rights Systems call upon contracting parties to put in place mechanisms to overcome these obstacles, namely, publicising the existence of remedies and enforcement procedures;¹⁹ protecting victims,

¹³ There are other sources of international law with relevant standards (ie the ILO Convention (No 111) concerning discrimination in respect of employment and occupation (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31; European Social Charter (Council of Europe, adopted 18 October 1961); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'); Framework Convention for the Protection of National Minorities (Council of Europe, adopted 1 February 1995)), but given space constraints, I concentrate on the sources which are expressly mentioned in the RED.

¹⁴ CERD, 'General Recommendation No 31' (2005) UN Doc A/60/18 ('Rec No 31') para 16; art 2(3)(b) ICCPR; Basic Principles (n 12) at 12; ECRI, 'General Recommendation No 1. Combating racism, xenophobia, antisemitism and intolerance' (1996) CRI(96)43 rev ('Rec No 1'). The ECRI also encourages granting equality bodies the power to hear and consider complaints, see 'General Recommendation No 2. Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level' (1997) CRI(97)36 ('Rec No 2').

¹⁵ Rec No 31, *ibid*; ECRI, 'General Recommendation No 7. National legislation to combat racism and racial discrimination' (2002) CRI(2003)8 ('Rec No 7') at 10-11.

¹⁶ HRC, 'General Comment No 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add. 13 ('Comment No 31') para 15; *Silver and others v UK*, App No 5947/72 (ECtHR 24 October 1983) para 103.

¹⁷ Comment No 31, *ibid*, paras 15 and 18; *ZUBS v Australia*, Comm No 6/1995 (2000) UN Doc CERD/C/55/D/6/1995; *Silver*, *ibid*. See also D J Harris and others (eds), *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 575; D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1991) 279-280.

¹⁸ *Silver*, *ibid*.

¹⁹ Preparatory Meetings (n 12) Appendix I at 42; Basic Principles (n 12) at 12(a); Rec No 1 (n 14).

relatives and witnesses against retaliation;²⁰ making sure that remedies are ‘accessible, expeditious and not unduly complicated’;²¹ and making available legal assistance²², legal aid²³ and also interpreters.²⁴ Several UN bodies have also recommended wide standing rules to enable access to courts not only to individual victims of discrimination, but also to legal persons,²⁵ groups²⁶ and third parties,²⁷ including equality bodies.²⁸ The ECRI goes even further by proposing that the law puts public authorities under a positive duty to promote equality and to prevent institutional discrimination.²⁹

International Human Rights Systems also show sensitivity towards the widely acknowledged difficulties experienced by victims in proving discrimination. Hence, UN bodies have repeatedly recommended shifting the burden of proof to the defendant in non-criminal procedures.³⁰

Finally, international instruments also compel contracting parties to develop appropriate sanctions and reparation measures to redress victims. This entails, on the one hand, the punishment of the offender,³¹ and on the other, granting relief measures to victims. The UN Basic Principles emphasise that, in both cases, they should be effective, proportionate and timely.³² Relief measures typically consist on the payment of an adequate monetary compensation for both material and moral

²⁰ Rec No 31 (n 14) paras 6-9, 17; Basic Principles (n 12) at 12(b).

²¹ Preparatory Meetings (n 12) Appendix I at 42.

²² Basic Principles (n 12) at 12(c); Rec No 1 (n 14) and Rec No 7 (n 15) at 10. The ECRI also recommends that equality bodies ‘provide aid and assistance to victims’, Rec No 2 (n 14) principle 3(d).

²³ Preparatory Meetings (n 12) Appendix I at 42.

²⁴ Rec No 31 (n 14) paras 6-9, 17.

²⁵ The Model Legislation (n 12) talks about ‘legal persons which came into existence prior to the commission of the offence and whose purpose is to combat racial discrimination’, at 11. If this wording was followed, a group setting up an association after being victim of particular offence could not initiate proceedings, but individual claims from members of that association could be supported by pre-existing anti-racism NGOs, which could lodge complaints on their own or on the victims’ behalf.

²⁶ The Model Legislation (n 12) mentions ‘individuals and groups of individuals’ (at 13), whilst the Basic Principles have a slightly narrower scope as it refers to ‘groups of victims’ (at 13).

²⁷ Preparatory Meetings (n 12) at 52(b).

²⁸ Rec No 2 (n 14) at 3(e).

²⁹ Rec No 7 (n 15) at 8.

³⁰ CERD, ‘General Recommendation No 30’ (2004) UN Doc CERD/C/64/Misc.11/rev.3 (‘Rec No 30’) para 18; Preparatory Meetings (n 12) Appendix I at 49; Rec No 7 (n 15) 11.

³¹ Comment No 31 (n 16) para 16.

³² Basic Principles (n 12) at 15.

damages.³³ However, Human Rights Systems also recall the relevance of monetary relief measures, like the reimbursement of expenses³⁴ and non-monetary forms of compensation, such as restitution,³⁵ rehabilitation (eg through the provision of social and psychological assistance)³⁶ and satisfaction measures,³⁷ or even preventive measures to avoid the same type of breaches in the future.³⁸

3.2.2 The minimum standards of the Race Equality Directive

The Race Equality Directive is in line with most of these principles. However, the enforcement provisions are remarkably open, which leaves MS plenty of flexibility for its implementation.

As with most Human Rights Systems, the RED allows MS to choose between judicial or administrative enforcement procedures, provided one is at least available and that they can be initiated ‘even after the relationship in which the discrimination is alleged to have occurred has ended’.³⁹ The CJEU jurisprudence also requires that courts (or equivalent bodies) are independent, impartial,⁴⁰ and they provide reasoned decisions.⁴¹ In addition, in line with the CERD and the ECRI recommendations, article 7(1) of the RED⁴² establishes that MS can enable the use of conciliation procedures ‘where they deem it appropriate’.⁴³ Whilst some authors have interpreted this expression as an invitation to develop not only conciliation

³³ CERD, ‘General Recommendation No 26’ (2000) UN Doc A/55/18; art 6 ECHR; Basic Principles (n 12) at 20; Rec No 1 (n 14) and Rec No 7 (n 15) at 12.

³⁴ Model Legislation (n 12) at 11.

³⁵ Basic Principles (n 12) at 19.

³⁶ *ibid*, at 21.

³⁷ For instance, the publication of the judgment (Model Legislation (n 12) at 11) or public apologies (Basic Principles (n 12) at 22(e)).

³⁸ Comment No 31 (n 16) para 17.

³⁹ Art 7(1) RED.

⁴⁰ Case C-424/99 *Commission v Austria* [2001] ECR I-9285. See also C-380/01 *Gustav Schneider v Bundesminister für Justiz* [2004] ECR I-01389.

⁴¹ Case C-222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Heylens* [1987] ECR 4097.

⁴² Although the mainstream interpretation is that MS are not compelled to ensure that those mechanisms are available, Ambrus considers that the RED sets ‘an obligation on the Member States to explore under which circumstances it would be useful and effective to introduce these procedures’, M Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (Eleven 2011) 163.

⁴³ Art 7(1) RED.

procedures but also other types of ADR mechanisms,⁴⁴ it remains totally up to MS to do so.

Concerning the potential obstacles that victims may face to make their rights effective, the RED calls upon MS to disseminate information about the Directive among ‘the persons concerned by all appropriate means’.⁴⁵ In line with international recommendations, article 9 of the RED obliges MS to protect ‘individuals’ who could suffer retaliation ‘as a reaction to a complaint or to proceedings’,⁴⁶ which once again, leaves MS the choice to protect only victims, or to extend protection to relatives, witnesses, etc.

In line with Human Rights Systems, the RED standard on legal standing is *apparently* wide, as it refers not only to individual victims (‘all persons who consider themselves wronged’),⁴⁷ but also to the role of ‘associations, organisations or other legal entities’ with a legitimate interest.⁴⁸ However, the Directive leaves MS discretion to decide, yet again, whether these legal persons can act ‘on behalf *or* in support’ of the complainant (with the latter’s approval, in either case), which has led most MS to allow *support only*.⁴⁹

Despite these ambiguities, the RED properly addresses one of the greatest barriers for victims once a complaint has been lodged, namely, the difficulty of proving discrimination. In line with international recommendations, MS must ensure that once the claimant has proved ‘facts from which it may be presumed that there has been direct or indirect discrimination’, the burden of proof shifts to the respondent, except in criminal procedures.⁵⁰

⁴⁴ According to Ambrus during the negotiations of the Recast Directive, the Commission argued against the insertion of references to mediation and conciliation on the ground that there was no added value ‘by going into more detail as regards the different types of efforts to find an amicable solution’ (n 42) 160-161 and footnote 51. See also Commission (EC), ‘Amended proposal for a Parliament and Council Directive (EC) on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast version)’ COM/2005/0380 final – COD 2004/0084, para 2(1)(25), amendment 61.

⁴⁵ Article 10 RED.

⁴⁶ Art 9 RED. Note that this phrase entails MS to make protection against retaliation conditional upon lodging a complaint.

⁴⁷ Art 7(1) RED.

⁴⁸ Art 7(2) RED.

⁴⁹ M Bell, I Chopin and F Palmer, *Developing Anti-Discrimination Law in Europe: The 25 EU Member States compared* (OPEU 2007) 55-57.

⁵⁰ Art 8 RED. See a detailed analysis Ch 5, s 5.3.1.

Regarding reparation and sanctions, article 15 of the RED refers in general to MS' duty to adopt 'effective, proportionate and dissuasive' sanctions for breaches of national measures implementing the Directive.⁵¹ Although the Directive leaves plenty of discretion to MS, it clearly emphasises the adequacy of monetary compensation by explicitly mentioning it. In this respect, the CJEU case law does not require MS to provide restitutionary remedies, provided full financial compensation is granted instead.⁵²

As an additional tool to enhance enforcement, the RED compels MS to set up an equality body with three main functions, which must be conducted independently: providing assistance to victims, performing surveys and publishing reports and recommendations.⁵³ Whilst the Directive does not require these bodies to have legal standing in discrimination procedures, as some international bodies suggest, it does incorporate –in a condensed form– the most essential ECRI recommendations.⁵⁴

Although most Human Rights Systems do not refer to positive action measures, article 5 of the RED does, but only to clarify that MS are *allowed* to take such measures. Hence, the RED does not really *promote* positive action, not even to minimum standards; it just ensures that whenever positive action measures are adopted –within the CJEU parameters– they are considered lawful.

Finally, the RED also promotes a deliberative approach to enforcement⁵⁵ which goes beyond international recommendations. Articles 11 and 12 encourage MS to promote dialogue between social partners and with NGOs. Yet, as promising as it may sound, MS are given leeway to develop these provisions, as they are only

⁵¹ Note that the RED uses the term 'sanctions' broadly, to refer both to remedies and to sanctions *stricto sensu*, see C Tobler, *Remedies and Sanctions in EC non-discrimination law* (OPEU 2005) 8; Ambrus (n 42) 273. See also Ch 5, s 5.3.1.

⁵² Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 28; Case C-271/91 *Marshall v Southampton and South West Hampshire AHA* [1993] ECR I-04367, para 193. See a detailed analysis in Ch 5, s 5.4.1.

⁵³ Art 13 RED.

⁵⁴ Rec No 2 (n 14).

⁵⁵ On deliberative and reflexive approaches to equality law enforcement see C McCrudden, 'Equality Legislation and Reflexive Regulation: a Response to the Discrimination Law Review's Consultative Paper' (2007) 36 ILJ 255; G de Búrca, 'Stumbling into Experimentalism: The EU Anti-Discrimination: The EU Anti-Discrimination Regime' in C F Sabel and J Zeitlin (eds), *Experimentalist Governance in the European Union. Towards a New Architecture* (OUP 2010) 215.

expected to encourage dialogue ‘in accordance with national traditions and practice’.

3.2.3 Tokenism or effective legislation?

Whilst the ICERD, ICCPR and the ECHR have been in force for decades and the RED was adopted almost 15 years ago, the standards that they laid down have not always been properly implemented at national level. In other cases, they have been implemented on paper but no further steps have been taken to foster their effective application.⁵⁶

Hence, the question is whether these standards are purely symbolic or they are meant to yield practical effects. In principle, both Human Rights Systems and EU law have emphasised that they should be implemented not only *formally*, but also *effectively*. In this respect, the CERD has stated that signatory states are under a duty to eliminate discrimination ‘by all appropriate means’,⁵⁷ which according to Banton entails an obligation to eradicate discrimination in practice.⁵⁸ As the CERD clearly explained in the case *Gelle v Denmark*, ‘it does not suffice, for the purposes of article 4 of the [ICERD], merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions’.⁵⁹

Similarly, the UN Human Rights Committee (‘HRC’) has emphasised that legislative measures are not enough for the fulfilment of the duty derived from article 2(2) ICCPR. The latter entails an indirect obligation of removing any possible obstacle which can hinder access to reparation. Therefore, states must embark in ‘specific activities [...] to enable individuals to enjoy their rights’,⁶⁰ which includes

⁵⁶ At international level, see eg *Gelle v Denmark*, Comm No 34/2004 (2006) UN Doc CERD/C/68/D/34/2004; *Williams Lecraft v Spain*, Comm No 1493/2006 (2009) UN Doc CCPR/C/96/D/1493/2006. Regarding the RED, see eg FRA, *The Racial Equality Directive: application and challenges* (OPEU 2012); FRA, *Fundamental rights: challenges and achievements in 2011* (OPEU 2012) 155-175; I Chopin and C Germaine-Sahl, *Developing Anti-Discrimination Law in Europe. The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (OPEU 2013) 87-88.

⁵⁷ Art 2(1) ICERD.

⁵⁸ M Banton, *International Action Against Racial Discrimination* (Clarendon Press 1996) 307.

⁵⁹ *Gelle v Denmark* (n 56) para 7.3.

⁶⁰ Comment No 31 (n 12).

the access to an effective remedy before a ‘judicial, administrative or legislative authorit[y]’ or other type of bodies with legal authority.⁶¹ According to the CERD, this may entail not only providing legal aid or legal assistance, but also developing means to counter victims’ ‘lack of knowledge, means, courage or determination to take action’⁶² and training security forces and enforcement officials.⁶³

Similarly, in the interpretation of the ECHR, the ECtHR has noted that remedies ‘must be “effective” in practice as well as in law’.⁶⁴

Finally, at EU level, the principle of loyal cooperation enshrined in article 4(3) TEU requires MS to ‘take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’ and to ‘facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives’.

On the basis of article 4(3) TEU, the CJEU has developed the principles of equivalence and effectiveness, according to which: (1) the rules governing EU law enforcement in MS must not be less favourable than those governing similar national actions (principle of equivalence), and (2) enforcement of EU law must not be made virtually impossible or excessively difficult (principle of effectiveness).⁶⁵ The CJEU has repeatedly applied these principles in the field of anti-discrimination law. For instance, in *Defrenne* it ruled that ‘the principle of equal pay [...] may be relied upon before the national courts and [...] these courts have a duty to ensure the protection of the rights which this provision vests in individuals’.⁶⁶ Later on, the CJEU made clear that MS have both a *positive obligation* ‘to introduce into their

⁶¹ Art 2(3)(b) ICCPR.

⁶² CERD, ‘Summary record of the 1359th meeting: Australia, Azerbaijan’ (26 August 1999) UN Doc CERD/C/SR.1359.

⁶³ Rec No 30 (n 30) at 24. See also eg CERD. ‘Concluding observations on Spain’ (28 March 1996) CERD/C/304/Add.8, at 17.

⁶⁴ *Kudla v Poland* App No 30210/96 (ECtHR, 26 October 2000) para 157.

⁶⁵ See inter alia Cases 158/80, *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 1805; C-246/09 *Bulicke v Deutsche Büro Service GmbH* [2010] ECR I-07003. See also T Tridimas, *The General Principles of EC Law* (2nd edn, OUP 2006) 279-285; J Malmberg and others, *Effective Enforcement of EC Labour Law* (Kluwer 2003) 43 ff; C Tobler, *Remedies and Sanctions in EC non-discrimination law* (OPEU 2005) 12. For a critical view, cf M Bobek, ‘Why There is No Principle of “Procedural Autonomy” of the Member States’ in H W Micklitz and B de Witte (eds), *The European Court and the Autonomy of the Member States* (Intersentia 2012) 305.

⁶⁶ Case 43/75 *Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

internal legal systems such measures as are needed to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process',⁶⁷ and a *negative obligation* to 'set aside' national rules which could jeopardise the effectiveness of EU law.⁶⁸

As these cases show, the CJEU puts a clear emphasis on the existence of effective remedies to enforce EU law in MS,⁶⁹ a key duty which is actually recognised in primary law through article 19(1)(2) TFEU.⁷⁰ However, it should be borne in mind that –theoretically, at least– the duty of loyal cooperation of MS concerns not only judicial remedies, but rather *any* measure which might be necessary to give effect to EU law at national level. In fact, according to some commentators, the duty of loyal cooperation binds MS both regarding the *means* taken to fulfil their obligations and the *outcome* of those measures.⁷¹ For our purposes, this implies that MS should not only take the necessary steps to *implement* the RED, but also *ensure that it deploys its intended effects*.

Accordingly, both Human Rights Systems and EU law call upon signatory states to take all the necessary measures to develop the respective racial equality principles in practice. However, the extent to which this is actually achieved is another story which depends on a wide range of legal, social and political factors. In the next section, we will focus on some of the legal factors: through the analysis of the RED I will try to disentangle the limiting elements which are inherent to its wording.

⁶⁷ Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 17.

⁶⁸ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 21.

⁶⁹ Among many other cases, see also Case C-177/88 *Dekker v VJV-Centrum* [1990] ECR I-3941; Case C-180/95 *Draehmpaehl v Urania Immobilienservice* [1997] ECR I-2195.

⁷⁰ See also Charter of Fundamental Rights of the European Union [2000] OJ C364/1 ('EU Charter') art 47(1).

⁷¹ C Blumann and L Dubouis, *Droit institutionnel de l'Union européenne* (4th edn, Lexis Nexis, 2010) 106.

3.3 *The RED's limits to promote effective equality legislation at national level*

In an ideal world, social systems should distribute and redistribute their resources evenly,⁷² so that no ex-post isolated measures would be necessary to *correct* problems or failures.⁷³ It is only when an isolated problem arises that 'corrective rights and duties' should come into play,⁷⁴ generally in the form of reparation and punishment measures⁷⁵ to restore individuals to their equal position.

Indeed, the theoretical discussion developed in Chapter 1 indicates that, especially in the field of racial discrimination, power redistribution is preferable to the correction of failures: *preventing* discrimination is always more effective than *correcting* it. However, rather than taking a redistributive approach, the RED takes a clear corrective approach by focusing almost exclusively on ex-post remedies and sanctions.⁷⁶ Although some provisions could have played a role in the introduction of redistributive mechanisms, they generally fall short due to their vagueness and ambivalence. That is the case of article 5, which *allows* positive action but does not encourage it; and the same can be said of article 11, which could have been drafted in more precise and persuasive terms to foster, inter alia, the insertion of equality clauses in collective agreements or the adoption of domestic codes of conduct. Consequently, as long as MS wish to stick to the RED minimum implementation requirements, it is to be expected that most of them will also adopt a corrective justice approach. In fact, MS's positive action and positive duties policies to prevent racial discrimination in employment continue to be rather limited.⁷⁷

Besides promoting a corrective justice approach, the RED also encourages individual enforcement.⁷⁸ A clear signal of this individual approach is the language

⁷² A J Morris, 'On the Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice' (1995) 15 OJLS 199, 205.

⁷³ W D Lamont, 'Justice: Corrective and Distributive' (1941) 16 Journal of the British Institute of Philosophy 3.

⁷⁴ Morris (n 72) 205.

⁷⁵ Lamont (n 73) 13.

⁷⁶ Arts 7-9, 15 RED.

⁷⁷ Chopin and C Germaine-Sahl (n 56) 79-80.

⁷⁸ See eg C McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in S Fredman (ed) *Discrimination and Human Rights. The Case of Racism* (OUP 2001) 252, 294-295; D Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?

used throughout the directive, which indicates that the RED mainly seeks to address the situation of individual victims. For instance, the definition of direct discrimination refers to ‘one person’ and to the need to find another person in a comparable situation.⁷⁹ Similarly, article 7(2), on judicial and/or administrative procedures, strictly refers to ‘the complainant’, in singular; and article 15 states that sanctions ‘may comprise the payment of compensation to *the* victim’.⁸⁰ Hence, the RED was drafted thinking mainly at *individual victims* who would access enforcement mechanisms *individually*.

Nevertheless, the RED also comprises some group justice features, like the obligation to create a body ‘for the *promotion* of equal treatment’,⁸¹ the duty to promote social dialogue,⁸² to encourage collective ‘agreements laying down anti-discrimination rules’⁸³ or the possibility for legal entities to support individual claims.⁸⁴ However, the language used in these provisions contrasts starkly with that used in the individual enforcement provisions. Whilst the latter are worded in prescriptive terms (ie ‘shall be’, ‘shall apply’, ‘shall take’) and clearly signpost that MS must respect those requirements, the former are drafted in a much more flexible and open style. For instance, article 11(1) of the RED states that ‘Member States shall, *in accordance with national traditions and practice*, take adequate measures to *promote* the social dialogue’.⁸⁵ They also provide that MS ‘shall encourage’⁸⁶ dialogue with NGOs or that MS are *not prevented* to take positive action measures.⁸⁷ These provisions are mere ‘invitations’, which do not compel MS to take any action at all. Similarly, the RED mentions the possibility for national legislation to allow interest organisations to *act on behalf* of victims –with their consent– in judicial procedures, but the minimum requirement is just that NGOs are allowed to *support*

Directives 2000/43/EC, 2000/78/EC and 2002/???/EC changing Directive 76/207/EEC in context’ (2002) 8 ELJ 290, 299; B Hepple, ‘Race and Law in Fortress Europe’ (2004) 67 MLR 1; M Bell, *Racism and Equality in the European Union* (OUP 2008) 67.

⁷⁹ Art 2(2)(a) RED.

⁸⁰ Author’s italics.

⁸¹ Art 13 RED.

⁸² Art 11(1) RED.

⁸³ Art 11(2) RED.

⁸⁴ Art 7(2) RED.

⁸⁵ Author’s italics.

⁸⁶ Art 12 RED.

⁸⁷ Art 5 RED. Author’s italics.

victims,⁸⁸ which was already possible anyway in many MS. Hence, the RED puts the ball in the court of MS to develop collective enforcement systems, which remain purely optional tools to complement individual enforcement mechanisms.⁸⁹

The pre-eminence of the individual enforcement model was ratified by the *Firma Feryn* judgment.⁹⁰ The case concerned an employer's public statement that he did not want to hire immigrants, without any specific person being identified as a victim of such policy.⁹¹ Following a teleological interpretation, the CJEU established that 'victimless discrimination'⁹² is included in the concept of direct discrimination of article 2(2)(a) of the RED.⁹³ It nevertheless considered that MS are not obliged to provide redress mechanisms if there is no identifiable victim. Under article 7(2) of the RED, MS are only bound to allow legal entities with a legitimate interest to act 'on behalf or in support' of the victim, with the latter's consent. Following AG Maduro,⁹⁴ the CJEU distinguished between the *substantive* contents of the RED and the *enforcement* provisions and pointed that the fact that 'victimless discrimination' was prohibited under the RED did not imply that the directive obliged to provide enforcement mechanisms to address it.⁹⁵ The CJEU reminded that the RED sets only minimum requirements, meaning that MS *can* allow legal entities, like associations or equality bodies, to bring *actio popularis* without the existence of any identifiable victim, *but they are not obliged* to do it.⁹⁶

⁸⁸ For example, by backing them morally or financially.

⁸⁹ Still, a recent report indicates that, for racial discrimination disputes, *actio popularis* and class actions are available in ten and nine MS, respectively; Chopin and Germaine-Sahl (n 56) 96-97.

⁹⁰ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187. A similar conclusion can be drawn for Directive 2000/78/EC from the ruling in Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării* ECLI:EU:C:2013:275.

⁹¹ *ibid*, para 16.

⁹² H Tissandier, 'Une discrimination condamnable même sans victime' (2008) *Revue de jurisprudence sociale* 885; R Krause, 'Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187' (2010) 47 *CMLRev* 917, 923.

⁹³ In para 25 the CJEU stated that '[t]he existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim'.

⁹⁴ *Firma Feryn* (n 90) Opinion of AG Poaires Maduro, delivered on 12 March 2008, paras 12-14.

⁹⁵ *Firma Feryn* (n 90) para 26. This reasoning poses problems because it entails the recognition of substantive rights for which enforcement mechanisms cannot be derived from EU, see Krause (n 92) 927-928; M Ambrus, M Busstra and K Henrard, 'The Racial Equality Directive and Effective Protection against Discrimination: Mismatches between the Substantive Law and its Application' (2010) 3 *Erasmus Law Review* 165, 168.

⁹⁶ *ibid*, paras 26-27.

This individual and corrective justice approach has at least two significant shortcomings which inevitably limit the potential of the RED to trigger effective legislation at national level.

First, the individual enforcement model is triggered *only if* a victim files a complaint, so apart from coping with the harm caused by discrimination, the victim also bears the burden to report the situation.⁹⁷ Paradoxically, whilst the system relies on *victims' action*, *inaction* (social lumping) is one of the most typical reactions among victims, so in many MS the enforcement mechanisms are rarely triggered. For instance, an EU-wide empirical survey points that 'not reporting discrimination is the norm'.⁹⁸ In a UK survey, 35% of respondents confronted with discrimination would follow a lumping strategy.⁹⁹ A Spanish 2010 survey reveals that 94.3% of respondents who experienced discrimination did not report it.¹⁰⁰ According to some studies, the scarcity of complaints is related to procedural, time and financial barriers to access justice,¹⁰¹ but it also reflects a lack of awareness as regards anti-discrimination legislation.¹⁰² For instance, in some MS up to 60% of respondents had not heard from equality bodies and up to 80% had not heard from other support organisations.¹⁰³ In another report, the lack of awareness was mentioned as a reason for underreporting by 36% of respondents, but the main reason was the lack of confidence in the legal system (63%).¹⁰⁴ In fact, the scarcity of litigation itself may undermine victims' confidence to report because 'the impression may prevail that success is improbable'.¹⁰⁵ Furthermore, even if victims have the strength to take action, they may face a number of additional obstacles which may lead them to drop their complaints half way through, for instance, fear of suffering retaliation.¹⁰⁶

⁹⁷ Mason (n 3) 1741. See a similar criticism to UK Equality Law in J Wadham and others (eds), *Blackstone's Guide to The Equality Act 2010* (2nd edn, 2012) 151.

⁹⁸ The report also points that the higher underreporting rates are found in Portugal, Spain, Slovenia, Austria, Bulgaria and Latvia. See FRA, *EU-Midis. Main Results Report* (EUPD 2009) 50.

⁹⁹ See H Glenn, *Paths to Justice. What People Do and Think about Going to Law* (OUP 1999) 12.

¹⁰⁰ RED2RED, *Panel sobre discriminación por origen racial o étnico (2010): la percepción de las potenciales víctimas* (Ministerio de Sanidad, Política Social e Igualdad 2011) 94.

¹⁰¹ I Chopin and E M Gounari, *Developing Anti-discrimination Law in Europe. The 27 EU Member States Compared* (European Human Consultancy and MPG 2009) 61; FRA, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (OPEU 2011) 38, 42.

¹⁰² FRA, *The Racial Equality Directive. Application and Challenges* (OPEU 2012) 19-21.

¹⁰³ *ibid* 9.

¹⁰⁴ *ibid* 12.

¹⁰⁵ Bell, Chopin and Palmer (n 49) 54.

¹⁰⁶ FRA, *EU-Midis. Data in Focus Report III. Rights Awareness and Equality Bodies* (OPEU 2010) 12.

Second, this model fails to address effectively the problem of systemic or institutional discrimination, which tends to be ‘deeply entrenched’ and thus ‘may be less susceptible to individual litigation’.¹⁰⁷ Discrimination can be a diffuse phenomenon affecting a whole group, which may be difficult to associate with a particular action or person. Institutional discrimination is rather a ‘*collective failure*’ which can be perceived ‘in processes, attitudes and behaviour[s]’,¹⁰⁸ and may –or may not– emerge as a specific discriminatory incident. It can be the result of ‘a lack or shortage of adequate resources’, or from ‘ill will’ and ‘selective attitudes’¹⁰⁹ based on stereotypes and prejudices, which in the long run can lead to social exclusion, victimisation and group disadvantages.¹¹⁰

Due to this collective aspect, the RED individual justice model offers limited possibilities to address institutional discrimination effectively because it ‘hides from sight structural and institutional problems that cannot be seen by looking at individual events alone. [T]he episodic view, just like the law, is only concerned with specific events [...] and is unconcerned with the more general mechanisms, patterns, causes and consequences that underlie or contribute to the specific events’.¹¹¹ Although the RED makes a nod to group justice mechanisms on several provisions, it does not really require MS to implement any of them. For instance, article 5 simply *allows* positive action; article 7 does not compel MS to develop any form of collective standing rights; article 11 only requires MS to *promote* and *encourage* equal treatment through monitoring practices and collective agreements; and article 13 obliges MS to create an equality body, but no enforcement powers are required.

Yet, despite the RED’s lack of push factors to develop collective justice mechanisms at national level, it is true that individual complaints can sometimes play a role in tackling institutional discrimination. If discrimination materialises in concrete cases, individual complaints may help raise awareness and push states to

¹⁰⁷ M Bell, ‘Beyond European Labour Law? Reflections on the EU Racial Equality Directive’ (2002) 8 ELJ 384, 397-398.

¹⁰⁸ Sir W Macpherson, *The Stephen Lawrence Inquiry: report of an inquiry* (Home Office 1999) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.6625&rep=rep1&type=pdf>> accessed 10 June 2012, para 6.34.

¹⁰⁹ *ibid.*

¹¹⁰ See eg C McCrudden, ‘Institutional Discrimination’ (1982) 2 OJLS 303.

¹¹¹ T Makkonen, ‘Equal in Law, Unequal in Fact: Racial and ethnic discrimination and the legal response thereto in Europe’ (PhD thesis, University of Helsinki 2010) 28.

address the problem beyond the individual case, especially if complaints are backed by strong civil society organisations.¹¹² NGOs can try to ‘activate the courts’¹¹³ and feed discussion and public debate about the public authorities’ failure to address group disadvantages (‘shaming’)¹¹⁴ and they may be able to push for policy and legal change (‘reframing’).¹¹⁵ This was the case in the UK with the Stephen Lawrence campaign and subsequent inquiry,¹¹⁶ which led to the introduction of positive duties as a means to tackle institutional discrimination.¹¹⁷ More recently, the joined complaint of 18 individual Roma pupils started at the initiative of anti-racist NGOs (the *Ostrava case*)¹¹⁸ has been considered an example of activating the ECtHR against institutional discrimination,¹¹⁹ which has led the Czech Government to take some steps to tackle Roma segregation in education.¹²⁰ However, the use of individual litigation as a group justice mechanism should remain a complimentary – and not a primary – tool because it depends entirely on the action of non-institutional actors – ie interests groups and media campaigns – which may fluctuate in time and across countries.

¹¹² J A Goldston, ‘The role of European anti-discrimination law in combating school segregation: the path forward after Ostrava’, speech delivered at the conference *Roma and equal access to education: from segregation to integrated schooling*, Brussels, 28 - 29 April 2006 <<http://www.enar-eu.org/Page.asp?docid=16034&langue=EN>> accessed 28 May 2013.

¹¹³ A S Sweet, ‘The European Court of Justice’ in P Craig and G De Burca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 121, 145.

¹¹⁴ D Panke, ‘The European Court of Justice as an Agent of Europeanization? Restoring Compliance with EU Law’ (2006) 14 JEPP 847, 852.

¹¹⁵ *ibid* 853.

¹¹⁶ Macpherson (n 108).

¹¹⁷ M Bell, ‘British Developments in Non-Discrimination Law: the Equality Act’ in R Schulze (ed), *Non-Discrimination in European Private Law* (Mohr Siebelk 2011) 209, 211.

¹¹⁸ *DH v the Czech Republic* App No 57325/00 (ECtHR, 13 November 2007). See also D Strupek, ‘Before and after the Ostrava case: Lessons for Anti-Discrimination Law and Litigation in the Czech Republic’ [2008] Roma Rights Journal 42; Goldston (n 112).

¹¹⁹ In this case, the ECtHR acknowledged the collective element by stating that national legislation ‘had a disproportionately prejudicial effect on the Roma community’ and not considering it necessary to examine the applicants’ individual cases. Hence, Farkas considers that this ruling ‘virtually transformed *DH and Others* from an application brought by eighteen individual applicants [...] into an actio popularis or collective complaint’, L Farkas, ‘Limited Enforcement Possibilities under European Anti-Discrimination Legislation – A Case Study of Procedural Novelties: *Actio Popularis* Action in Hungary’ (2010) 3 Erasmus Law Review 181, 188.

¹²⁰ However, the results of these measures are still limited, see OSCE, *Equal Access to Quality Education for Roma Children. Field Assessment Visit to the Czech Republic* (OSCE 2012) <<http://www.osce.org/odihr/96661>> accessed 10 June 2013.

3.4 Conclusion

This chapter has assessed if the RED can elicit effective national legislation *on its own*. Whilst it is clear that the RED can be considered a sound statement against racism,¹²¹ it has obvious limitations which hinder its capacity to trigger effective national frameworks to combat racial discrimination at domestic level. Arguably, some of these limitations are the product, on the one hand, of the application of the EU principle of subsidiarity,¹²² and on the other, of the EU decision-making system and the strict legal base for adopting racial discrimination legislation, which requires MS unanimity.¹²³ It seems that MS political will and the need to compromise might have been a strong factor for the elusiveness of some RED provisions, which could have potentially impacted on sensitive issues, such as the regulation of the employment market, immigration control or judicial procedures. For instance, Bell indicates that, despite some symbolic declarations, MS were for long time reluctant to adopt legislative measures against racism.¹²⁴ Whilst they finally did so in 2000, the weakness of some of the RED provisions may still be the residue of that initial reluctance. In this respect, Mason suggests that the RED's recurrent delegation to MS discretionary action is due to the 'controversial nature' of some measures and 'a lack of willingness to take radical action to eliminate race discrimination'.¹²⁵

In any event, whatever the reason, the fact remains that the RED has failed to develop a new paradigm which could have inspired MS to address racism effectively. Instead, it largely follows pre-existing international standards based on individual litigation. However, as Hepple already pointed years ago:

'Even if law appears to have little impact, (...) it is not the Acts as such which should be the main focus of criticism, but rather those who have failed to make the most of the Act's symbols in order to promote change.'¹²⁶

Hence, the second part of this thesis analyses not only British and Spanish compliance with the RED, but also the extent to which their respective national

¹²¹ Howard (n 1) 141.

¹²² Art 5(3) TEU.

¹²³ Art 19(1) TFEU.

¹²⁴ M Bell, *Anti-Discrimination Law and the European Union* (OUP 2002) 62-63.

¹²⁵ Mason (n 3) 1742.

¹²⁶ B Hepple, 'The Race Relations Acts and the process of change' (1987) 14 *New Community* 32, 37.

legislators and other relevant actors have been able to go *beyond* the RED standards to find effective ways to address racism. However, before starting with the substantive comparison, Chapter 4 will shortly introduce the British and Spanish equality frameworks.

Chapter 4. Learning from divergences? The national legal framework in Britain and Spain

*'Not calling racism what
is racism is a way of not
addressing it or aiding it.'*

Miguel Pajares

4.1 Introduction

Following the analytical framework developed in Chapter 2 and the shortcomings of EU equality law highlighted in Chapter 3, this chapter introduces the contextual elements necessary to conduct the comparison between Britain and Spain in the second part of the thesis. The aim is thus to put their respective racial equality legislation and policies in their *historical* and *social* background and to shortly introduce the basic features of British and Spanish *substantive* equality law.¹ The chapter mainly refers to racial equality legislation, but it also gives account of the wider equality and employment framework.

From the outset, it should be noted that British and Spanish equality laws are at different stages of development: whilst the first British anti-discrimination laws were passed in the 1960s, in Spain they were only adopted from 1980 onwards. British legislation is thus more developed and has also been subject to more litigation and scholarly analysis. In addition, whilst the Spanish academic debate has largely focused on sex discrimination legislation, British academic literature on all discrimination grounds is fairly abundant.

The chapter starts with a socio-historical introduction to British and Spanish equality legislation (4.2). It then outlines the main substantive features of current British and Spanish legislation (4.3), including the discrimination grounds (4.3.1), the material scope (4.3.2), the personal scope (4.3.3) and the prohibited conducts (4.3.4), including a reference to multidimensional discrimination (4.3.4.5). The chapter finally presents the key features of the

¹ Due to space constraints, this chapter only provides a short summary of a much complex picture. For further details, see eg L Dickens, 'The Road is Long: Thirty Years of Equality Legislation in Britain' (2007) 45 *British Journal of Industrial Relations* 463; B Hepple, *Equality. The New Legal Framework* (Hart 2011) 7-11; M D Cancio Álvarez, E Álvarez Conde, A Figueruelo Burrieza and L Nuño Gómez (dir), *Estudios Interdisciplinarios sobre Igualdad* (Iustel 2009).

enforcement system before employment-specialist judicial bodies (4.4), before drawing the conclusion (4.5).

4.2 *A socio-historical introduction to the British and Spanish equality legislation from its inception to the present day*

The beginnings

The origins of British and Spanish equality legislation are markedly different. In Britain, the first race relations act was adopted in the early 1960s to tackle the increasing racial prejudices that accompanied the 1950s post-colonial and post-war migration. The arrival of Commonwealth migrants was ‘almost entirely unwanted’² and created important hostilities, especially against the non-white newcomers.³ The Labour Government limited the free entrance of migrants through the adoption of the Commonwealth Immigrants Act (1962),⁴ and to counterbalance this restrictive measure⁵ and address the increasing racial intolerance,⁶ the *Race Relations Act* (1965) (‘RRA 1965’) was passed. Yet, racism continued to be a pressing issue,⁷ so the Racial Relations Board and the National Committee for Commonwealth Immigrants, together with the Home Secretary, Roy Jenkins, started a campaign to raise awareness about the need to broaden the scope of legislation against racial discrimination.⁸ As a result, a new Race Relations Act was adopted in October 1968 (‘RRA 1968’), shortly after the adoption of the Commonwealth Immigrants Act 1968.

In contrast, in Spain, equality law only started to properly develop in the late 1980s and 1990s, following the democratisation and stabilisation process that took place in the 1970s and early 1980s. The origins of Spanish equality law stem from the adoption of the Spanish Constitution (*Constitución Española*, ‘CE’)

² R Hansen, *Citizenship and Immigration in Post-War Britain: The Institutional Origins of a Multicultural Nation* (OUP 2000) 4.

³ E Bleich, *Race Politics in Britain and France. Ideas and Policymaking since the 1960s* (CUP 2003) 35.

⁴ *ibid*, 45-48.

⁵ B Hepple, *Equality. The New Legal Framework* (Hart 2011) 7.

⁶ Bleich (n 3) refers to the 1958 Nottingham and London riots against West Indians as one of the causes that led to the adoption of the 1965 RRA, 43-44.

⁷ H Street, G Howe and G Bindman, *Anti-Discrimination Legislation: The Street Report* (Political and Economic Planning 1967). See also Bleich (n 3) 75.

⁸ Bleich (n 3) 70-71; Hepple (n 5) 8.

in 1978, which states that Spaniards are equal before the law,⁹ prohibits discrimination on an open-ended list of grounds,¹⁰ and establishes a positive duty for public powers to ensure that equality for both *individuals* and *groups* is 'real and effective'.¹¹ Whilst the adoption of the first British legislative measures was driven by an increasing ethnic diversity and pressure from social movements such as the Campaign Against Racial Discrimination ('CARD'),¹² the recognition of the right to equality and non-discrimination in the Spanish Constitution was mainly driven by comparative law¹³ and, most certainly, by Spanish aspirations to join the European Union and its new –and forthcoming– commitments at international level.¹⁴

However, in the 1970s, with the adoption of the Equal Pay Act 1970 and the Sex Discrimination Act 1975 ('SDA'), race was overtaken by sex as the discrimination ground which fostered a further expansion of British equality law. Feminist groups had been campaigning for long time for the adoption of legislation against sex discrimination, so it was starting to be more widely supported than racial anti-discrimination legislation, which continued to be seen as a migrant-related problem.¹⁵ Hence, the Government strategically adopted the SDA before passing its 'twin brother', the Race Relations Act 1976 ('RRA 1976'),¹⁶ which was nevertheless preceded by another restrictive migrant-focused measure, the Immigration Act 1971. The SDA and the RRA 1976 respectively created the first equality enforcement bodies, the Equal Opportunities Commission ('EOC') and the Commission for Racial Equality ('CRE').

At the end of the 1970s, whilst Britain had already passed three Race Relations Acts, had set up the CRE and a network of social actors and initiatives

⁹ Art 14 CE.

¹⁰ *ibid.*

¹¹ In Spanish art 9(2) CE reads: 'Corresponde a los poderes públicos promover las condiciones para que la libertad y la igualdad del individuo y de los grupos en que se integran sean reales y efectivas; remover los obstáculos que impidan o dificulten su plenitud y facilitar la participación de todos los ciudadanos en la vida política, económica, cultural y social.'

¹² M Banton, *Promoting racial harmony* (CUP 1985) 63-64; P Ratcliffe, 'Race', *Ethnicity and Difference. Imagining the Inclusive Society* (Open UP 2004) 135-136.

¹³ L Galvez Munoz, 'La cláusula general de igualdad' [2003] *Anales de Derecho*. Universidad de Murcia 195, 196.

¹⁴ For instance, Spain ratified the ICERD in 1968 and joined the Council of Europe in 1979.

¹⁵ Hepple (n 5) 8-9.

¹⁶ Bleich (n 3) 95-96.

opposing racial discrimination was consolidating,¹⁷ Spanish society was still relatively homogenous and had not yet become a migrants' reception country. Roma had been suffering racial segregation for centuries,¹⁸ but in the 1970s there was still a low level of awareness about their situation and racial discrimination was not –yet– considered a pressing problem.¹⁹ Therefore, the real engines for the development of equality legislation in Spain were feminist movements. Once the Constitution was adopted, feminist associations lobbied to set up a legal and institutional framework which could ensure advancement towards gender equality.²⁰ The first provision prohibiting discrimination in employment relationships was inserted in the 1980 Workers' Statute.²¹ In 1983 the Women Institute (*Instituto de la Mujer*) was created with the objective of promoting gender equality²² and several 'women boards' were also set up in different regions between 1989 and 1998.²³

The evolution of social perceptions of ethnic minorities and racism

In the early 1990s Spanish society started to experience strong demographic transformations due to the rapid increase in the inflow of migrant workers, especially from Morocco and the Spanish-speaking Latin-American countries. Whilst in 1990 there were 0.4 million foreigners, out of which only 35.4% were non-EU nationals, in 2001 the total amount of foreigners rose to 1.1

¹⁷ Ratcliffe (n 12) 136-137; F Reeves, *Race Equality in Local Communities. A guide to its promotion* (Race Equality West Midlands 2007) 133-114.

¹⁸ See eg Colectivo Ioé and Heliconia, *Motivos de Discriminación en España. Estudio Explotario* (Ministerio de Igualdad 2009) 6; M Laparra and A García, 'Una Comunidad Gitana de Tamaño y Perfiles todavía Imprecisos' in M Laparra (coord), *Diagnóstico social de la comunidad gitana en España. Un análisis contrastado de la Encuesta del CIS a Hogares de Población Gitana 2007* (Ministerio de Sanidad, Política Social e Igualdad 2011) 27.

¹⁹ M Pajares, 'Discriminación racial y políticas antidiscriminatorias' in S Garganté and others, *La discriminación racial. Propuestas para una legislación antidiscriminación en España* (Icaria 2003) 13.

²⁰ L Nuño Gómez, 'El Origen de las Políticas de Género. La Evolución Legislativa y las Políticas de Igualdad en el Estado Español' in Álvarez Conde, Figueruelo Burrieza and Nuño Gómez (n 1) 278, 313.

²¹ Ley 8/1980, de 10 de marzo, del Estatuto de los Trabajadores. Art 17(1) prohibited discrimination on the grounds of age, sex, origin, civil status, race, social status, religious or political ideas, membership of trade unions, family links with other workers from the same company and language.

²² Ley 16/1983, de 24 de octubre, de creación del Organismo Autónomo Instituto de la Mujer.

²³ Nuño Gómez (n 20) 314.

million, where 65.8% were non-EU nationals.²⁴ This demographic shift boosted anti-migrant feelings due to spatial segregation, cultural and religious differences, increasing competition in the job market and, allegedly, higher insecurity.²⁵ Anti-migrant feeling reached its peak with a violent racist outbreak against Moroccans in El Ejido (Almería). Tension between locals and migrants had been growing for years due to a high density of foreigners working and living in poor conditions. The murder of two farmers by a migrant in January 2000 and the murder of a woman by a Moroccan with a learning disability in February 2000²⁶ triggered the worse ethnic conflict in decades. Citizens from El Ejido and surrounding villages assaulted Moroccans and damaged their properties, sometimes with the complicity of local police.²⁷ These events were highly reported on the press²⁸ and were condemned by NGOs, trade unions, several political parties, and even by the European Parliament.²⁹ Further racist incidents against Moroccans and Roma followed,³⁰ which showed the risk of a ripple effect and finally led to the amendment of the Organic Law on the Rights of Foreigners (*Ley Orgánica de Extranjería*, 'LOEX') in late 2000 and 2003.³¹

Shortly before the El Ejido outbreak, the MacPherson inquiry report³² was published in Britain, analysing how the racist murder of Stephen Lawrence in 1993 was handled by the Metropolitan Police. However, these almost

²⁴ M A Cea D'Ancona and M S Valles Martínez, *Evolución del Racismo y la Xenofobia en España. Informe 2011* (MTIN 2011) 25. According to Cea and Valles, the number of foreigners reached 4.9 million in 2010.

²⁵ See eg P Stangeland, 'La Prevención de los Delitos Racistas' [1997] Eguzkilore-Cuaderno del Instituto Vasco de Criminología 213, 216-217. For a more recent study, see also Centro de Investigaciones Sociológicas ('CIS'), Study No 2.846 (2010), questions 8-9, 19-20.

²⁶ M T Alcalá Caballero and others, 'Los Sucesos de El Ejido' <<http://www.ub.edu/penal/historia/trs/Ejido1.htm>> accessed 10 December 2012.

²⁷ For a detailed report see Sos Racismo, *El Ejido. Racismo y explotación laboral* (Icaria 2001).

²⁸ See Universidad Pompeu Fabra, *Historia del Pensamiento Criminológico*, 'Los Sucesos de El Ejido, Febrero 2000' <<http://www.ub.edu/penal/historia/ejido/principal.htm>> accessed 15 February 2013.

²⁹ Parliament (EU), Resolution on the outbreak of racism and xenophobia in El Ejido (Spain) [2000] OJ C339/271.

³⁰ Sos Racismo, *Informe Anual sobre el Racismo en el Estado Español 2001* (Icaria 2001) 25. See also the Socialist Party's question to the Government few days after these incidents, *Diario de Sesiones del Congreso de los Diputados*, Año 2000 VII Legislatura Núm. 21, Sesión de la Diputación Permanente núm. 2, 13/07/2000, 930-931.

³¹ Ley Orgánica 8/2000, de 22 de diciembre; Ley Orgánica 14/2003, de 20 de noviembre. However, this amendment was rather superficial, see n 42.

³² Sir W Macpherson, *The Stephen Lawrence Inquiry: report of an inquiry* (Home Office 1999) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.6625&rep=rep1&type=pdf>> accessed 10 June 2012, rec 11.

contemporary events were differently perceived by public opinion and had a dissimilar impact on the respective national societies. In Britain,

[t]he hate crime that resulted in the murder of Stephen Lawrence, and the inquiry into the murder and police investigation of it, [...] resulted in the beginnings of a re-coding of race and a redrawing of the boundaries of toleration in British society, in which *racism* and *racists* rather than *ethnic minority groups* are increasingly being presented as social problems (or diseases) to be removed from society'.³³

From a sociological perspective, the press played a key role in shaming racism through 'inclusive gestures' and by drawing a difference between 'ordinary, decent Britons –white and black– and the racist “savages” [...] who killed Stephen Lawrence'.³⁴ Equally crucial were the efforts of the Lawrence family, who managed to rally previous anti-racist initiatives and disperse energies into a campaign that rose awareness about racial and institutional discrimination³⁵ and started to transform the perception of racism.³⁶ This process culminated in the adoption of the *Race Relations (Amendment) Act 2000*, which extended protection against discrimination to actions of public authorities (including the police)³⁷ and put them under the positive duty to eliminate discrimination and promote equality.³⁸

In contrast, in Spain, El Ejido conflict resulted in a rather different public debate. Spanish press linked the events to criminality derived from lack of migrants' integration and justified in that way racist behaviour from 'isolated' Spaniards' groups.³⁹ In addition, the press downplayed declarations from anti-racist stakeholders,⁴⁰ who did not manage to utilise the momentum to properly bring racism into public discussions around ethnic minorities, as it was the case in Britain. Hence, rather than highlighting racial discrimination, the public

³³ D McGhee, *Intolerant Britain? Hate, citizenship and difference* (Open UP 2005) 15 (author's italics).

³⁴ E McLaughlin and K Murji, 'After the Stephen Lawrence Report' (1999) 3 *Critical Social Policy* 371, 377.

³⁵ M Bell, 'British Developments in Non-Discrimination Law: the Equality Act' in R Schulze (ed), *Non-Discrimination in European Private Law* (Mohr Siebelk 2011) 209, 211.

³⁶ B Bowling, *Violent Racism: Victimization, Policing and Social Context* (OUP 1999); McGhee (n 33) 17.

³⁷ Section 19b.

³⁸ See further Ch 7.

³⁹ Pajares (n 19) 36; M de la Fuente García, 'La argumentación en el discurso periodístico sobre la inmigración' (PhD thesis, Universidad de León 2005) 539-540. See examples of media coverage in Universidad Pompeu Fabra (n 28).

⁴⁰ Fuente García, *ibid.*

discourse around El Ejido events was phrased in terms on 'otherness', migration and integration.⁴¹ As a result, *migration* legislation was amended, but anti-*discrimination* legislation did not experience decisive changes.⁴²

The impact of EU Law

Despite these different backgrounds, EU law has pushed both British⁴³ and Spanish equality law towards convergence, at least at the most basic level. Indeed, following the accession of the UK to the European Community in 1973, British sex anti-discrimination law had to be adapted to article 157 TFEU (ex article 141 TEC)⁴⁴ and the existing *acquis*,⁴⁵ and ever since it had to be adjusted to subsequent directives and case law from the CJEU.⁴⁶ Similarly, in preparation for accession to the European Economic Community ('EEC') in 1986,⁴⁷ Spain transposed Directive 75/117⁴⁸ and the implementation of other equal treatment Directives continued afterwards.⁴⁹ However, in the field of racial equality the

⁴¹ Pajares (n 19) 13-15, 35-37.

⁴² Article 23 of the LOEX (on migrants' right not to be discriminated against) had already been inserted through the Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social. After El Ejido events, article 3 of the LOEX (recognising migrants' fundamental rights) was inserted through Ley Orgánica 8/2000, de 22 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, but it just codified prior case law from the Constitutional Court, see eg SSTC 107/1984 de 23 noviembre; 99/1985 de 30 septiembre; 144/1990 de 26 septiembre; 137/2000 de 29 mayo.

⁴³ Regarding Britain, see eg J Squires, 'Equality and Diversity: A New Equality Framework for Britain?'

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.6625&rep=rep1&type=pdf>> accessed 10 June 2012.

⁴⁴ Already before joining, the Equal Pay Act 1970 and Equal Pay Act (Northern Ireland) 1970 were adopted.

⁴⁵ eg Council Directives (EEC) 75/117 of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L045/19; 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L039/40. See also Hepple (n 5) 9.

⁴⁶ For instance, the CJEU decision in *Marshall* led Britain to abolish upper limits for victims' compensation in cases of sex and racial discrimination, see Case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority* [1993] ECR I-04367.

⁴⁷ See eg E Lombardo, 'La europeización de la política española de igualdad de género' [2003] *Revista Española de Ciencia Política* 65.

⁴⁸ See eg art 35(1) CE.

⁴⁹ Council Directives (EEC) 76/207; 86/378 of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L225/40; 86/613 of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986] OJ L359/56 were transposed by Ley 8/1980, de 10 de marzo, del Estatuto de los Trabajadores and RD Legislativo 1/1994, de 20 de junio, por el que se aprueba el Texto Refundido de la Ley General de la Seguridad Social.

turning point was the insertion of article 19 TFEU (ex article 13 TEC) in the Amsterdam Treaty (1997), which enabled the adoption of the Race Equality Directive ('RED')⁵⁰ and the Framework Equality Directive ('FED')⁵¹ three years later.

Spain had to introduce much more substantial amendments to implement both directives, but did it with a delay of three months⁵² –in December 2003–⁵³ and avoiding any public debate, through a law which incorporated more than fifty other measures.⁵⁴ Despite being one of the requirements of the RED, the setting up of the equality body only formally started in 2007,⁵⁵ but it was not until 2010 that the Spanish Racial Equality Council⁵⁶ ('SREC') started to be operative. Overall, the transposition of the RED was so poor that in some aspects it did not even respect the minimum requirements.⁵⁷

Britain implemented the directives through several regulations.⁵⁸ In the area of racial equality, the *Race Relations Act 1976 (Amendment) Regulations 2003* introduced a new definition of indirect discrimination, changed the burden of proof test and removed some prior exceptions.⁵⁹ Yet, compared to Spanish

⁵⁰ Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

⁵¹ Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

⁵² Art 16 RED.

⁵³ It did so through the adoption of Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social, arts 17 to 43, also called 'Ancillary Budget Law' (*Ley de Acompañamiento a los Presupuestos Generales*). Ley 51/2003, de 2 de diciembre, de igualdad de oportunidades, no discriminación y accesibilidad also implemented the FED as regards disability discrimination.

⁵⁴ *ibid.* At this respect, see ECRI, 'Report on Spain. Fourth monitoring cycle' (2010) CRI(2011)4 at 20.

⁵⁵ RD 1262/2007, de 21 de septiembre, por el que se regula la composición, competencias y régimen de funcionamiento del Consejo para la Promoción de la Igualdad de Trato y no Discriminación de las Personas por el Origen Racial o Étnico (modified by RD 1044/2009, de 29 de Junio).

⁵⁶ In Spanish: *Consejo para la Promoción de la Igualdad de Trato y la No Discriminación de las Personas por el Origen Racial o Étnico*.

⁵⁷ See eg L Cachón, 'España y la Directiva 2000/43: de la "ocasión perdida" a una legislación general sobre igualdad de trato' [2004] *Tiempo de Paz* 13.

⁵⁸ Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660; Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661; Employment Equality (Age) Regulations 2006, SI 2006/1031. The Disability Discrimination (Employment) Regulations 1996, SI 1996/1456 were amended by the Disability Discrimination (Employment Field) (Leasehold Premises) Regulations 2004, SI 153/2004.

⁵⁹ Squires (n 43).

legislation, British equality law already largely complied with the RED.⁶⁰ Still, the new regulations augmented the fragmentation of British equality legislation and generated confusion because different levels of protection were provided for race or ethnic origin, nationality and colour.⁶¹

The attempts to codify equality law and promote equal opportunities

At this point, British equality law had reached a considerable degree of development, but it was regulated through different instruments which had been amended several times and contained significant inconsistencies. In 2005 the Labour Government set up an Equality Review and a Discrimination Law Review,⁶² to identify the weaknesses of equality law, create a single equality commission and adopt a single equality act.⁶³ As a result, the *Equality Act 2006* ('EqA 2006') merged the Racial Equality Commission, the Equal Opportunities Commission and the Disability Rights Commission and replaced them by the Equality and Human Rights Commission ('EHRC').⁶⁴ Four years later, the *Equality Act 2010* ('EqA 2010') repealed most of the previous instruments,⁶⁵ but retained the approach of prior legislation.⁶⁶

Almost when the UK Government launched the Equality Review, the Spanish governmental policy towards equality legislation started changing following the socialist party victory at the 2004 elections.⁶⁷ The new Government made equality policies one of its priorities⁶⁸ and proposed several legislative

⁶⁰ Not with the FED, though, which introduced protection against discrimination in employment in three new areas: religion or belief, sexual orientation and age.

⁶¹ ECRI, 'Report on the United Kingdom. Third monitoring cycle' (2004) CRI(2005)27 at 24. See also Bell (n 35) 212-213.

⁶² B Hepple, M Coussey and T Choudhury, *Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart 2000).

⁶³ See further details in S Khan, 'Introduction and Background' in J Wadham and others (eds), *Blackstone's Guide to The Equality Act 2010* (2nd edn, OUP 2012) 1, 6-10.

⁶⁴ For a comment, see Hepple (n 5) 145.

⁶⁵ It did not repeal the EqA 2006, which still rules the ECHR main features.

⁶⁶ K Monaghan, 'The Equality Bill: a sheep in wolf's clothing or something more?' [2009] European Human Rights Law Review 2.

⁶⁷ 'Zapatero, investido presidente del gobierno con mayoría absoluta' *ABC* (Madrid, 17 April 2004).

⁶⁸ The creation of this Ministry was very controversial and it was finally suppressed in 2010. E Mucientes, 'Adiós a las grandes apuestas de Zapatero: Vivienda e Igualdad' *El Mundo* (Madrid, 20 October 2010).

initiatives in the field of disability,⁶⁹ sexual orientation⁷⁰ and gender.⁷¹ The flagship project was the Gender Equality Act ('GEA'), passed in 2007,⁷² which not only implemented Directives 2002/73/EC and 2004/113/EC, but also launched innovative measures, like the duty to set up gender equality plans for public authorities and large companies.⁷³ The GEA was followed by the *Human Rights Plan*⁷⁴ and the *Strategic Equal Opportunities Plan* (2008 – 2011), which proposed the adoption of a *Comprehensive Equality Bill* ('CEB').⁷⁵

To some extent, the British EqA 2010 and the Spanish CEB had similar objectives, ie harmonising equality law and promoting equal opportunities,⁷⁶ but the CEB aimed to go further: it also sought to introduce an open-ended list of grounds, extend the scope of protection beyond employment for all discrimination grounds,⁷⁷ and set up effective civil and administrative law remedies.⁷⁸ However, unlike the EqA 2010, the CEB was never adopted.⁷⁹ Still,

⁶⁹ Ley 27/2007, de 23 de octubre, por la que se reconocen las lenguas de signos españolas y se regulan los medios de apoyo a la comunicación oral de las personas sordas, con discapacidad auditiva y sordociegas; Ley 49/2007, de 26 de diciembre, por la que se establece el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad.

⁷⁰ Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio.

⁷¹ It should be noted that despite this apparent commitment towards equality, the Socialist Government was not always consistent in practice. It was repeatedly accused of encouraging ethnic profiling among police forces (see eg Amnesty International, *Parad el racismo, no a las personas. Perfiles raciales y control de la inmigración en España* (Amnesty International 2011)). The HRC ruling in *Williams Lecraft v Spain*, Comm No 1493/2006 (2009) CCPR/C/96/D/1493/2006 gave visibility to this problem, although the facts date back from 1992.

⁷² Ley Orgánica 3/2007, de 22 Marzo, para la igualdad efectiva de mujeres y hombres.

⁷³ Art 45(2) CEB.

⁷⁴ Gobierno de España, 'Plan de Derechos Humanos' (2008) <http://www.ohchr.org/Documents/Issues/NHRA/Spain_NHRAP.pdf> accessed 10 July 2014, measure 42.

⁷⁵ Proyecto de Ley Integral para la Igualdad de Trato y la No Discriminación [BOCG 10/06/2011] (A)130-1.

⁷⁶ M Doherty, 'Evolutionary rather than Revolutionary: The Equality Act 2010' (2011) 32 Business Law Review 52.

⁷⁷ CEB, Preamble at I, arts 2 and 3. The material scope covered discrimination in access to and during the employment relationship (including access to self-employment, art 14), education, healthcare, social protection, access to goods and services (including housing), access to public spaces and the media (including advertising).

⁷⁸ Arts 23(2), 24-26, 29-30, 43-49. For an analysis see A Aguilera Rull, 'El Proyecto de Ley integral para la igualdad de trato y la no discriminación' [2011] InDret 1.

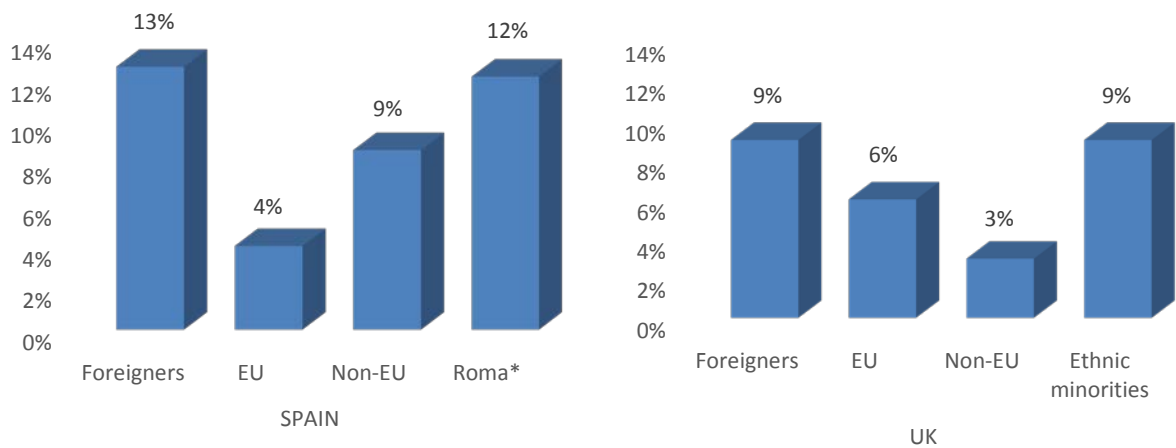
⁷⁹ The socialist government tried to adopt the Bill before the November 2011 elections, but did not receive the necessary support from the other parliamentary groups. See 'Pajín no se sale con la suya y la ley de Igualdad de Trato tendrá que debatirse' *La Gaceta* (Madrid, 7 June 2011); 'El Congreso "tumba" la Ley de Igualdad de diseño socialista', *La Gaceta* (Madrid, 11 September 2012).

the EqA 2010 has been criticised, inter alia, for being more a harmonising instrument, than a modernising and promotion tool⁸⁰ and for not taking into account the particularities of some discrimination grounds.⁸¹

The current situation

Nowadays, the ethnic diversity of the workforce can be considered roughly similar in both countries. Although a thorough comparison cannot be established due to the lack of data on workers' ethnic origin in Spain, Figure 2 suggests that ethnic minorities probably account for roughly 10% of the Spanish workforce,⁸² whilst they account for 9% in Britain.

Figure 2. Workforce diversity (foreigners and ethnic minorities) in the UK and Spain (2011).



*Estimate

Source: Own elaboration with data from Department for Business, Innovation and Skills (UK); Instituto Nacional de Estadística (Spain) and Fundación Secretariado Gitano (Spain).

Having said that, the economic crisis has had an adverse impact on the development of equality law and the social situation of ethnic minorities in both countries. Budget cuts have negatively affected British and Spanish advice providers, but the drop in public funding has been especially dramatic for the British equality body, the EHRC, whose budget has been cut by 75%.⁸³ From a

⁸⁰ Bell (n 35); M Malik, 'Modernising discrimination law: proposals for a single equality act for Great Britain (2007) 9 IJDL 73.

⁸¹ Bell, *ibid*, 223.

⁸² It is nearly impossible to establish a more precise percentage because many first generation migrants have already acquired the Spanish nationality and are not 'foreigners' anymore.

⁸³ A Gentleman, 'Equality commission loses its office, but is it losing its purpose?' *Guardian* (London, 25 January 2013).

social perspective, however, the crisis has probably had a larger impact in Spain, where high unemployment and cultural and religious differences have been used to feed racist discourses,⁸⁴ especially against Roma,⁸⁵ Moroccans and North-Africans.⁸⁶

From a legal perspective, Spanish racial equality law has not evolved much since the transposition of the RED in 2003,⁸⁷ but British equality law has actually gone backwards. The Coalition Government has refused to bring into force some of the most awaited EqA 2010 provisions, like the section on dual discrimination or the socio-economic inequalities duty.⁸⁸ This forms part of the Government's new approach to equality, which allegedly seeks to reduce bureaucracy and burdens on business.⁸⁹ The Government has also launched several consultations which have led to the abolition of the discrimination questionnaire⁹⁰ and third party harassment,⁹¹ and it is likely that tribunals' power to make general recommendations in discrimination disputes will suffer the same fate.⁹² Furthermore, since 2013, British victims have to pay –on top of representation costs– up to to £1200 to access the employment tribunals,⁹³ so in some cases their overall costs will exceed what they will be awarded in damages.⁹⁴ In this

⁸⁴ See eg R Montaner, 'El paro y la islamofobia alientan la ultraderecha' *Levante-EMV* (Valencia, 12 June 2011).

⁸⁵ Fundación Secretariado Gitano, *Social Inclusion Policies and Roma Population in Spain* (Soros Foundation Romania 2012) <www.gitanos.org/upload/79/35/1.8-FSG-pol> accessed 10 December 2012. Note, however, that the Government adopted the Ministerio de Sanidad, Servicios Sociales e Igualdad, 'Action Plan for the Development of Roma Population 2010-2012' (Centro de Publicaciones 2011), and the 'National Roma Integration Strategy in Spain 2012-2020' <http://ec.europa.eu/justice/discrimination/files/roma_spain_strategy_en.pdf> accessed 20 January 2014.

⁸⁶ CIS (n 25) question 21.

⁸⁷ Except for the adoption administrative legislation against racism in sports (Ley 19/2007, de 11 de julio, contra la violencia, el racismo, la xenofobia y la intolerancia en el Deporte; RD 203/2010, de 26 de febrero, por el que se aprueba el Reglamento de prevención de la violencia, el racismo, la xenofobia y la intolerancia en el deporte). Note also that since September 2014 the SREC is attached to the Institute for Women and Equal Opportunities (*Instituto de la Mujer y para la Igualdad de Oportunidades*), see Ch 6 (n 18).

⁸⁸ EqA 2010, s 1. See Home Department, House of Commons Hansard Ministerial Statements of 15 May 2012 (Column 29WS).

⁸⁹ Government Equalities Office ('GEO'), *The Equality Strategy. Building a Fairer Britain* (GEO 2010) 8.

⁹⁰ Enterprise and Regulatory Reform Act 2013, s 66.

⁹¹ *ibid*, s 65.

⁹² Deregulation HL Bill (2014-15) 33, s 2.

⁹³ Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893, Sch 2.

⁹⁴ Interview with Barbara Cohen, independent equality consultant (London, UK, 6 December 2012).

regard, some recent studies link the 60% fall in race discrimination claims⁹⁵ to the deterrent effect of tribunal fees.⁹⁶

4.3 *Essential substantive features of British and Spanish equality legislation*

4.3.1 **Discrimination grounds**

Under the EqA 2010 the protected characteristics continue to be the same as those which were earlier protected by individual acts, namely: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.⁹⁷ In Spanish law the list of *expressly* protected grounds⁹⁸ is slightly different: on the one hand, gender reassignment and pregnancy and maternity are not explicitly mentioned, but they fall within the scope of sex discrimination;⁹⁹ on the other hand, protection extends also to social condition, trade union membership and language.

Whilst in Spain, neither the law nor the jurisprudence have provided a definition of the concepts of 'racial' or 'ethnic origin',¹⁰⁰ in Britain, the EqA 2010 defines 'race'¹⁰¹ as including colour, nationality and ethnic or national origins.¹⁰²

⁹⁵ Trade Union Congress ("TUC"), *At what price justice? The impact of employment tribunal fees* (TUC 2014) 7.

⁹⁶ *ibid*; CAB, 'One year on from the introduction of fees to access the Employment Tribunal: Summary of results from a survey of employment cases brought to Citizens Advice bureaux' (July 2014) <www.citizensadvice.org.uk> accessed 9 September 2014.

⁹⁷ However, the EqA 2010 has arguably improved protection for discrimination on grounds of pregnancy and maternity, marriage and civil partnership, and gender reassignment; see a discussion in M Bell, 'British Developments in Non-Discrimination Law: the Equality Act' in R Schulze, *Non-Discrimination in European Private Law* (Mohr Siebeck 2011) 209, 214.

⁹⁸ Note that article 14 CE prohibits discrimination on 'any other condition or personal or social circumstance', so other grounds can also be covered (SSTC 128/1987 de 6 julio; 37/2004 de 11 marzo) for instance, chronic illness. This proviso is directly applicable (SSTC 15/1985 de 5 febrero; 53/1985 de 11 abril).

⁹⁹ For gender reassignment see eg STSJ (Cataluña) 19 enero 2006 (JUR 2006/84419); SJS (Barcelona) 142/2007 de 26 marzo; for pregnancy and maternity see eg SSTSJ (Madrid) 28 junio 2010 (AS 2010/1720); (Canarias) 1 abril 2012 (AS 2012/2430).

¹⁰⁰ However, according to the academic literature the term 'race' needs to be interpreted extensively, in line with the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), art 2; see M L Santos Pérez, 'La Prohibición de Discriminación por Raza' in Álvarez Conde, Figueruelo Burrieza and Nuño Gómez (dir), (n 20) 111, 116.

¹⁰¹ s 3(1).

¹⁰² s 9(1). Note also that racial discrimination is prohibited both by reference to a specific person or by reference to the racial group itself (EqA 2010, s 9(2)). Following section 9(5), the UK Government is currently consulting on the possibility to outlaw caste discrimination, see <<https://www.gov.uk/government/publications/caste-discrimination-legislation-timetable>> accessed 20 September 2014.

In this regard, it was established in *Mandla (Sewa Singh) v Dowell Lee*¹⁰³ that a group can be considered to be an ethnic group if it ‘regard[s] itself, and [is] regarded by others, as a distinct community by virtue of certain characteristics’.¹⁰⁴ This requires that the group is self-conscious of a ‘long-shared history’ and that it has its own ‘cultural tradition’, linked to its ‘family and social customs’ or to its religious beliefs.¹⁰⁵ Other non-essential characteristics may include a common geographical origin, language, literature, religion or having suffered oppression.¹⁰⁶ Although the Spanish concept of ‘race’ has not been officially defined, it is arguably close to the British definition of ethnic origin. Santos Pérez considers that it includes not only ‘biological races’ or physical appearance, but also more subjective aspects, such as having a specific family or social origin¹⁰⁷ or the affected group’s self-consciousness of its differences.¹⁰⁸ The subjective meaning of race developed in criminal law also refers to suffering rejection, as a basic condition to apply the aggravating circumstance of racism to a specific minority.¹⁰⁹

Finally, British legislation also includes the concept of ‘*national origin*’ within the concept of ‘race’, and quite similarly, the Spanish the Workers’ Statute (*Estatuto de los Trabajadores*, ‘ETT’)¹¹⁰ prohibits ‘*origin*’ discrimination.¹¹¹ Both

¹⁰³ [1983] AC at 562 (Lord Fraser).

¹⁰⁴ For a discussion, see N Bamforth, M Malik and C O’Cinneide, *Discrimination Law: Theory and Context. Text and Materials* (Sweet & Maxwell 2008) 805-811.

¹⁰⁵ Hepple (n 5) 38.

¹⁰⁶ This test has enabled the recognition of Sikhs, Jews and Roma as an ‘ethnic group’, but not that of Rastafarians or Muslims, see *Seide v Gillete Industries* [1980] IRLR 427 (EAT); *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548; *Commission for Racial Equality v. Dutton* [1989] 1 All ER 306; *Dawkins v Department of the Environment* [1993] ICR 517; *JH Walker Ltd v Hussain* [1996] ICR 291. However, in *R (E) v Governing Body of JFS* [2010] IRLR 135 (CA), the consideration of ‘Jewishness’ as an ethnic criteria was called into question; see Hepple (n 5) 38-39, 58.

¹⁰⁷ Santos Pérez (n 100).

¹⁰⁸ *ibid.*

¹⁰⁹ SAP (Madrid) 717/2010 de 28 junio, FJ 12. In this context, both blacks and Roma have been recognised to be ethnic minorities, see SAP (Lérida) 360/2002 de 4 junio; SAP (Madrid) 136/2011 de 29 noviembre; SJP (Huelva) 131/2008 de 14 de abril.

¹¹⁰ RD Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores.

¹¹¹ Arts 17(1) ETT; RD Legislativo 5/2000, de 4 de agosto, por el que se aprueba el texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social [BOE 08/08/2000] (‘LISOS’) art 12(2). Note, however, that this wording is inconsistent with other provisions which refer to ‘racial or ethnic origin’, and not to ‘origin’ on its own, see eg arts 4(2)(c) ETT and 8(13bis) LISOS.

concepts involve having a link with a national group rather than having a specific citizenship.¹¹²

4.3.2 Material scope

Both British¹¹³ and Spanish¹¹⁴ laws prohibit racial discrimination in access to employment and during the employment relationship, which include discrimination in the terms of employment, access to training, promotion and dismissal. Unlike Spanish law, however, the EqA 2010 explicitly outlaws discrimination after the employment relationship has ended, as required by the CJEU in *Coote*.¹¹⁵ Nevertheless, British law seems more lenient as regards the occupational requirements on the basis of which differential treatment is not considered discrimination: whilst in line with the RED,¹¹⁶ Spanish law refers to ‘essential and determinant’ occupational requirements;¹¹⁷ the EqA 2010 simply refers to ‘occupational requirements’.¹¹⁸ Still, this should not entail any difference in practice, as the EqA should be interpreted in accordance with the RED and with the CJEU case law, which requires exceptions to be construed strictly.¹¹⁹

4.3.3 Personal scope

The personal scope of British and Spanish law is also very similar. In both cases, it is not only employees who are protected, but rather, anyone who is in an employment relationship.¹²⁰ This requires being employed *personally* to do

¹¹² Hepple (n 5) 39. See also *London Borough of Ealing v Race Relations Board* [1972] AC 342 (HL). Note, however, that according to articles 13-14 CE, articles 10, 23 LOEX, and article 7(c) ETT, nationality discrimination is also outlawed provided the individual has a work permit (see eg STC 107/1984 de 23 noviembre); but cf with J L Monereo Pérez and LA Triguero Martínez, ‘Las personas extranjeras inmigrantes y sus derechos sociales ante las transversales novedades jurídicas nacionales y comunitarias de 2011 y 2012’ [2013] *Revista Española de Derecho del Trabajo* 17.

¹¹³ EqA 2010, ss 39 and 108.

¹¹⁴ Art 34(1) Ley 62/2003; arts 4(2)(c), 17(1), 55(5) ETT.

¹¹⁵ Case C-185/97 *Belinda Jane Coote v Granada Hospitality Ltd* [1998] ECR I-05199.

¹¹⁶ Art 4 RED.

¹¹⁷ Art 34(2)(2) Ley 62/2003.

¹¹⁸ EqA 2010, sch 9.

¹¹⁹ See eg C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651; C-273/97 *Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-07403.

¹²⁰ In Britain, section 83(2)(a) of the EqA 2010 applies to individuals employed ‘under a contract of employment, a contract of apprenticeship or a contract personally to do work’.

work¹²¹ and being *subordinate* to and under the *direction* of the employer.¹²² Hence, family and voluntary work are excluded,¹²³ but agency workers and sub-contracted workers are nevertheless protected.¹²⁴

4.3.4 Prohibited conducts

Both British and Spanish equality law outlaw four main types of discriminatory conducts, namely: direct discrimination, indirect discrimination, harassment and victimisation.¹²⁵ The following sections will shortly compare how they are applied in practice.

4.3.4.1 Direct discrimination

As a result of the impact of EU equality law, the British and the Spanish definition of direct discrimination is relatively similar. Both legal orders prohibit a less favourable treatment because of a protected characteristic¹²⁶ and both exclude the possibility to justify direct discrimination, except for age discrimination and for occupational requirements.¹²⁷ In addition, both legal frameworks provide protection against *discrimination by association*.¹²⁸

However, there are some noteworthy differences. Firstly, whilst the British definition enables the use of hypothetical comparators,¹²⁹ Spanish legislation only refers to present situations. Nevertheless, to a great extent, the Spanish Constitutional Court has remedied this by directly looking at the EU

¹²¹ See eg the Spanish cases: STSS de 23 enero 1976; 12 enero 1981; and the British cases: *Mirror Group v Gunning* [1986] ICR 145; *Mingeley v Pennock and Ivory* [2004] IRLR 373.

¹²² See eg the Spanish case SJS (Barcelona) 365/2000 de 14 junio; the British case *Jivraj v Hashwani* [2011] UKSC 40. At EU level see also Case C-256/01 *Allonby v Accrington & Rossendale College, Education Lecturing Services* [2004] ECR I-00873.

¹²³ *X v Mid-Sussex CAB* [2012] UKSC 59; SSTs de 10 noviembre 1971; 15 november 1971.

¹²⁴ See EqA, ss 41, 47, 49-52, 55; *James v Greenwich BC* [2008] ICR 545 (CA); *Muschett v HM Prison Service* [2010] IRLR 451 (CA) and the Spanish judgment STSJ (Galicia) 5 octubre 2010 (AS 2010/2452).

¹²⁵ In Britain, sections 111 and 112 of the EqA 2010 prohibit conducts seeking to instruct, cause, induce or aide contraventions. Similarly, article 28(2) of Ley 62/2003 clarifies that 'any order to discriminate' amounts to discrimination.

¹²⁶ EqA 2010, s 13(1); art 28(1)(b) Ley 62/2003.

¹²⁷ EqA 2010, s 13(2); sch 9.

¹²⁸ EqA 2010, s 13; SSTC 173/1994 de 7 junio; 41/2002 de 25 febrero; 17/2003 de 30 enero.

¹²⁹ While section 13(1) does not mention past situations, section 108 brings within the scope of direct and indirect discrimination and harassment unlawful conducts which are linked to past relationships.

definition¹³⁰ in its judgments.¹³¹ Secondly, in examining the causative link British courts only require the claimant to show that the *reason* for the discriminatory behaviour was the protected characteristic, not that there was an *intention* to discriminate.¹³² In contrast, the Spanish jurisprudence and academic literature seem to blend together '*reason*' and '*intention*', to the point that several commentators refer to the wrongdoer motive as the defining element of direct discrimination.¹³³ This interpretation narrows down the Spanish concept of direct discrimination and could lead Spanish courts to exclude direct discrimination in cases where the intention to discriminate is not obvious. Finally, the EqA 2010 explicitly prohibits racial segregation as a form of direct discrimination,¹³⁴ whilst this is not the case in Spain. Yet, some Spanish rulings have considered segregation as a decisive factor in determining the existence of *indirect* discrimination.¹³⁵

4.3.4.2 Indirect discrimination

The British and Spanish concept of indirect discrimination is also essentially similar. Both jurisdictions outlaw apparently neutral provisions or practices (broadly understood) which put people with the protected characteristics at a particular disadvantage, unless they are objectively justified by a legitimate aim and they are proportionate.¹³⁶ The intention or motive behind the provision or practice at stake is not relevant to prove the existence of indirect discrimination, but it may have an impact on the award of compensation or damages.¹³⁷ Furthermore, in both legal systems the comparison to demonstrate

¹³⁰ Art 2(2)(a) RED.

¹³¹ See eg STC 3/2007 de 15 enero FJ 3.

¹³² See *James v Eastleigh Borough Council* [1990] IRLR 288 (HL); *Nagarajan v London Regional Transport* [2000] 1 AC 50; *Amnesty International v Ahmed* [2009] IRLR 884 (EAT); *R (E) v Governing Body of JFS* (n 106). See also Hepple (n 5) 59.

¹³³ See eg STC 145/1991, de 1 de julio 1991; STC 7/2007 (n 131); J F Lousada Arochena, 'Principio de igualdad y derecho a no ser discriminado en las relaciones de trabajo (1)' [2008] *Actualidad Laboral* 800; E Gutiérrez García, 'La falta de intencionalidad en la discriminación indirecta' [2008] *Aranzadi Social* 51.

¹³⁴ Section 13(5) EqA 2010.

¹³⁵ See eg STC 145/1991 (n 133).

¹³⁶ EqA 2010, s 19(1); art 28(1)(c) Ley 62/2003. In Britain, the objective justification test was developed in *R (Elias) v Secretary of State for Defence* [2006] IRLR 934 (CA). In Spain, the LOEX contains a more condensed definition of indirect discrimination in article 23(2)(e), which can nevertheless be considered to have the same meaning than that of Ley 62/2003.

¹³⁷ Hepple (n 5) 68; Gutiérrez García (n 133).

disparate impact must be established as regards other persons in the same material situation¹³⁸ who do not share the protected characteristic, but there is no need to establish actual disadvantage.¹³⁹ The claimant can rely on statistical evidence to show disadvantage,¹⁴⁰ but he is not obliged to do so.¹⁴¹

However, a careful analysis of the British and Spanish concepts of indirect discrimination also denotes some differences. Firstly, in Britain the claimant needs to show that the relevant policy has or could have a detrimental effect *on him*,¹⁴² which rules out the possibility to bring *actio popularis*,¹⁴³ except for some actions that the Equality and Human Rights Commission ('EHRC') can initiate.¹⁴⁴ In contrast, Spanish trade unions may be entitled to bring a sort of *actio popularis* (*conflicto colectivo*) under certain circumstances.¹⁴⁵ Secondly, the Spanish concept of indirect discrimination excludes 'discrimination by lack of differentiation' (*discriminación por indiferenciación*), so –paradoxically– it is unlawful to treat differently persons in similar situations, but it is not to treat persons in different situations similarly. For instance, in the *Muñoz Díaz* case, the Spanish Constitutional Court considered that denying a survivor's pension to a Roma woman was not indirectly discriminatory because unregistered Roma marriages were equivalent to informal unions.¹⁴⁶ However, the ECtHR ruled that the Spanish authorities should have taken into account the social and cultural peculiarities of the claimant.¹⁴⁷ On a more general level, it can be argued that providing different treatment to unlike groups is part of the essence of substantive equality and indirect discrimination,¹⁴⁸ and it is indeed considered

¹³⁸ EqA 2010, s 23; STC 145/1991 (n 133).

¹³⁹ *Chief Constable of West Yorkshire Police and another v Homer* [2012] ICR 704 (SC); STC 145/1991.

¹⁴⁰ In Britain there is a whole discussion as to the meaning of 'particular disadvantage', the factors which should be taken into account and the 'degree of adversity' needed, see eg Bamforth, Malik and O'Cinneide (n 103) 313-321.

¹⁴¹ *London Underground Ltd v Edwards (No 2)* [1999] ICR 494 (CA). See also Bamforth, Malik and O'Cinneide, *ibid* 315.

¹⁴² EqA 2010, s 19(2)(c).

¹⁴³ See eg *Ruhaza v Alexander Hancock Recruitment Ltd* [2010] UKEAT 0337/10.

¹⁴⁴ EqA 2006, s 24-25, 30. Note, however, that the EHRC can only initiate judicial review proceedings if 'if there is or would be one or more victims of the unlawful act' (EqA 2006, s 30(3)(b)).

¹⁴⁵ See Ch 5.

¹⁴⁶ STC 69/2007 de 26 abril, FJ 4-5.

¹⁴⁷ *Muñoz Díaz v Spain* App No 59151/07 (ECtHR, 8 December 2009) at 64-65.

¹⁴⁸ See in this regard *Thlimmenos v Greece* App No 34369/97 (ECtHR, 6 April 2000), judgment by unanimity of the Grand Chamber; E Cobreros Mendazona, 'Discriminación por indiferenciación:

unlawful in Britain,¹⁴⁹ where public authorities are bound by a duty to have due regard to the promotion of equality and the elimination of discrimination.¹⁵⁰

4.3.4.3 Harassment

A key difference between the British and the Spanish definition of harassment is that the British one is broader: the unwanted conduct must have the ‘purpose or effect’ of violating the claimants’ dignity *or* ‘creating an intimidating, hostile, degrading, humiliating or offensive environment’ for that person.¹⁵¹ In turn, in Spanish law, as in EU law, *both* elements are necessary. Hence, Spanish case law has emphasised that it is not only necessary that the dignity of the claimant is violated, but also that it is repetitive, or at least that it takes place several times or during a prolonged period of time.¹⁵²

However, both legal systems have in common that no comparison is required to determine the existence of harassment,¹⁵³ and that the unlawful conduct does not need to have a direct causal link to the protected characteristic.¹⁵⁴ Furthermore, both jurisdictions require a double assessment of the unwanted conduct, based on both subjective and objective elements,¹⁵⁵ ie the perception of the victim and the objective consideration of whether the conduct at stake can amount to harassment.¹⁵⁶ Yet, unlike British tribunals, Spanish courts tend to consider, in addition, if the alleged perpetrator had an *intention* to harass,¹⁵⁷ which narrows down the scope of harassment.

Estudio y propuesta’ [2007] Revista Espanola de Derecho Constitucional 71; S Fredman, ‘Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty’ (2014) 43 ILJ 349.

¹⁴⁹ See eg *Ministry of Defence v Miss T DeBique* [2009] UKEAT 0049/09; *Homer* (n 137).

¹⁵⁰ See a discussion in Fredman (n 148).

¹⁵¹ EqA 2010, s 26(1)(b). In contrast, art 2(3) RED requires both that the conduct affects the dignity *and* creates a hostile, degrading, etc environment.

¹⁵² See eg the case of alleged racial and religious harassment against a Muslim Moroccan woman, STSJ (País Vasco) 12 diciembre 2007 (AS 2008/1403).

¹⁵³ Hepple (n 5) 79; STC 136/2006 de 4 abril.

¹⁵⁴ EqA 2010, s 26(1)(a); P Aramendi Sanchez, ‘Acoso Moral: su tipificación judicial y su tutela judicial’ [2002] Aranzadi Social 367.

¹⁵⁵ Hepple (n 5) 79.

¹⁵⁶ EqA 2010, s 26(4); SSTJ (Galicia) 22 diciembre 2004 (AS 20014/3720); (Galicia) 17 diciembre 2010 (AS 2011/97), FJ 3.

¹⁵⁷ SSTJ (Galicia) 22 diciembre 2004 (AS 2004/3720); (País Vasco) 12 diciembre 2007 (AS 2008/1403); (Galicia) 17 diciembre 2010 (AS 2011/97).

4.3.4.4 Victimisation

The main purpose of protection against victimisation is similar in Britain and in Spain, ie avoiding further discrimination in the form of retaliation and ensuring that the victim can freely report discrimination and access justice. Nevertheless, the origin of this protection is different: whilst in Britain it is clearly connected to anti-discrimination law, in Spain it emerged in the 1990s as a guarantee to the constitutional right to go to court (*garantía de indemnidad*).¹⁵⁸ However, in both jurisdictions, the concept of victimisation has the advantage that, provided claimants act in good faith,¹⁵⁹ they do not need to prove less favourable treatment¹⁶⁰ or a conscious motivation for the unwanted conduct.¹⁶¹

Also, the fact of bringing a claim is considered a 'protected act' in both legal systems. However, whilst the British concept of victimisation deploys protection even when the victims have not brought a claim but the alleged perpetrator has the belief that they may do so,¹⁶² in Spain it is only when victims have effectively taken action –be it judicially¹⁶³ or extra-judicially–¹⁶⁴ that they fall within the scope of protection of victimisation.¹⁶⁵ The British concept is also broader in that 'giving evidence or information' or 'doing any other thing' in connection with the EqA 2010 is also protected,¹⁶⁶ whilst in Spain witnesses are, in principle, excluded.¹⁶⁷ Nonetheless, the Spanish Constitutional Court has afforded protection to witnesses under article 20(1)(d) (right to communicate truthful information).¹⁶⁸

¹⁵⁸ Art 24(1) CE; see eg SSTC 7/1993 de 18 enero; 14/1993 de 18 enero.

¹⁵⁹ EqA 2010, s 27(3); F Cavas Martínez, 'La garantía de indemnidad del trabajador que presenta reclamaciones judiciales o extrajudiciales contra su empresario' [2006] Aranzadi Social 85.

¹⁶⁰ Hepple (n 5) 83;

¹⁶¹ *Nagarajan* (n 132); STC 6/2011 de 14 febrero.

¹⁶² EqA 2010, s 27(1); see also *Nagarajan*, *ibid* [19] (Lord Nicholls), [34] (Lord Steyn).

¹⁶³ SSTC 5/2003 de 20 enero; 16/2006 de 19 enero.

¹⁶⁴ SSTC 198/2001 de 4 octubre; 55/2004 de 19 abril; 144/2005 de 6 junio; 65/2006 de 27 febrero.

¹⁶⁵ Arts 4(2)(g); 17(1) ETT; art 8(12) LISOS.

¹⁶⁶ EqA 2010, s 27(2)(b)-(c).

¹⁶⁷ Note that article 9 of the RED refers to 'individuals' in general (not only to the claimant).

¹⁶⁸ STC 197/1998 de 13 octubre; STSJ (Asturias) 5 marzo 1999 (AS 1999/5330).

4.3.4.5 Multidimensional discrimination

Neither British nor Spanish laws provide an adequate protection for multidimensional discrimination. Although section 14 of the EqA 2010¹⁶⁹ prohibits direct discrimination based on two grounds ('dual discrimination'), the Coalition Government has refused to bring it into force. Up to now, British tribunals have made up for the lack of an appropriate legislative approach by considering dual discrimination cases on both grounds separately,¹⁷⁰ but this does not fully acknowledge victims' mixed identities and complex experiences.¹⁷¹

Whilst in Spain the GEA establishes the duty for public authorities to set up indicators and mechanisms to collect data on multiple discrimination,¹⁷² Spanish courts have never applied such concept. This has been criticised by several scholars, like Rey Martínez, who considers that the *Muñoz Díaz* case, concerning both ethnic and sex discrimination, was a lost opportunity for the Constitutional Court to develop the concept of multiple discrimination¹⁷³.

4.4 *Enforcement mechanisms before employment-specialist bodies*

In both Britain and Spain most employment discrimination claims must be brought before employment-specialist judicial bodies: in Britain, before the *Employment Tribunals*;¹⁷⁴ in Spain, before the *Employment Courts*.¹⁷⁵ At the outset, procedures before British Tribunals and Spanish Courts were conceived

¹⁶⁹ This provision only applies to direct discrimination, see G Moon, 'Justice for the Whole Person: The UK's Partial Success Story' in D Schiek and A Lawson (eds), *European Union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate 2012) 158, 171-172.

¹⁷⁰ See eg *DeBique* (n 149).

¹⁷¹ G Moon, 'Multiple Discrimination: Justice for the Whole Person' [2009] Roma Rights <<http://www.errc.org/cikk.php?page=1&cikk=3564>> accessed 10 December 2012.

¹⁷² Art 20(c) GEA.

¹⁷³ After the negative ruling of the Constitutional Court, the claimant successfully brought the case before the ECtHR, see *Muñoz Díaz v Spain* (n 147).

¹⁷⁴ EqA 2010, s 120(1). This includes cases of discrimination, harassment and victimisation (EqA 2010, part 5), cases where the employment relationship has ended (s 108), claims against acts instructing, causing, inducing or aiding discrimination (ss 111, 112), discrimination as regards occupational pension schemes (s 120), references by other courts of pending proceedings which concern anti-discrimination rules (s 122), equal pay claims (s 127) and claims brought by employees or a prospective employees against discriminatory term in a contract or in a collective agreement (s 144 and 145). The exception is cases where the complainant is a member of the armed forces, which must be referred to the Defence Council (EqA 2010, s 121).

¹⁷⁵ Ley 36/2011, de 10 de octubre, reguladora de la Jurisdicción Social ('LJS'), art 2(a) and (f).

to be accessible for employees and less formalistic than civil law procedures.¹⁷⁶ For instance, to start an action in Spain the claim does not need to include the points of law¹⁷⁷ and in Britain the claimant needs to submit the ET1 form, which is relatively easy to fill in and is available online.¹⁷⁸ Furthermore, the claimant does not need representation in first instance.¹⁷⁹ However, in practice discrimination claims tend to be technically complex, so most British and Spanish claimants prefer to have recourse to legal advice (and/or to representation, if they can afford it)¹⁸⁰ to maximise their chances.

Despite this similar approach, British and Spanish employment judicial bodies are remarkably different. Whilst British Tribunals are composed of three members: the Employment Judge and two lay members, representing the employers and the employees, respectively,¹⁸¹ Spanish Courts are made up of a single judge.¹⁸² Arguably, although the Spanish single judge model has the advantage of enhancing speedy rulings because no discussion is necessary,¹⁸³ the fact that British Tribunals are formed by a three persons' body can add legitimacy to judicial decisions. Furthermore, some research suggests that the composition of judicial bodies can have an impact on judicial decisions.¹⁸⁴ Even if standing before a three members' tribunal may be more intimidating for the parties,¹⁸⁵

¹⁷⁶ D Renton, *Struck out: why employment tribunals fail workers and what can be done* (Pluto Press 2013) 1; M Rodríguez Piñero, 'Sobre principios informadores del proceso de trabajo' [1969] *Revista de Política Social* 22; A Murcia Clavería, *La representación voluntaria en el proceso laboral* (Marcial Pons 1994) 42-43; J Cruz Villalón, *Compendio de Derecho del Trabajo* (5th edn, Tecnos 2012) 630.

¹⁷⁷ Art 80 LJS.

¹⁷⁸ 'Employment Tribunals Claim Form'

<www.employmenttribunals.service.gov.uk/employment-tribunals> accessed 10 August 2013.

¹⁷⁹ Cruz Villalón (n 176) 630; G S Morris, 'The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms' in L Dickens (ed), *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Hart 2012) 12.

¹⁸⁰ As regards Spain, see eg Cruz Villalón (n 176) 630-631; as regards Britain, see eg P L Latreille, J A Latreille and K G Knight, 'Making a Difference? Legal Representation in Employment Tribunal Cases: Evidence from a Survey of Representatives' (2005) 34 ILJ 308, 309.

¹⁸¹ Employment Tribunals Act 1996, s 4(1); Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, s 8. There are a number of cases in which the ET can be made up of the employment judge alone, see Employment Tribunals Act 1996, s 4(2)-(3), but discrimination proceedings are still normally heard by a full tribunal.

¹⁸² Cruz Villalón (n 176) 630.

¹⁸³ Research shows that British tribunals often need to extend discussion time, reconvene in chambers or consider draft judgments, see Morris (n 179) 13.

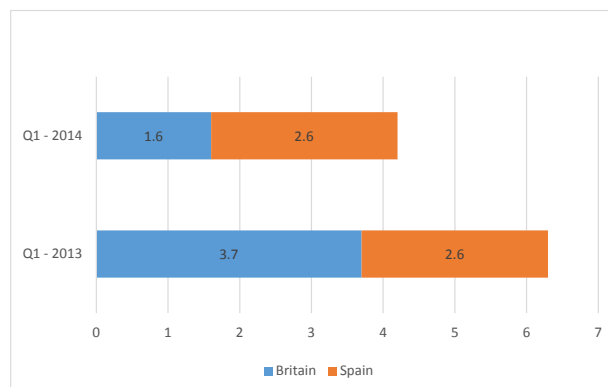
¹⁸⁴ See eg C Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions* (Commission for Judicial Appointments 2005); I Akrouh, 'Judicial Power and Anti-racism: Some Reflections' in ENAR, *Recycling Hatred: Racism(s) in Europe Today* (ENAR 2013) 116.

¹⁸⁵ Morris (n 179) 18.

British Tribunals' composition is more likely to yield fair rulings in discrimination disputes: in practice, including lay members with workplace experience¹⁸⁶ has proved to be useful in assessing evidence and facts and awarding remedies.¹⁸⁷

British Tribunals have traditionally had more experience in dealing with racial discrimination claims than Spanish Courts because litigation rates tended to be high, whilst this has never been the case in Spain.¹⁸⁸ However, from August 2013 the Coalition Government introduced fees to bring claims before British Tribunals, which has had a clear impact on litigation rates, as Figure 3 demonstrates, whilst Spanish litigation rates have remained stable. According to some reports, the overall number of claims filed in Britain has fallen by more than 70%¹⁸⁹ and racial discrimination claims have fallen by 60%,¹⁹⁰ which could lead to an intensification in the use of Alternative Dispute Resolution mechanisms as a substitute.¹⁹¹

Figure 3. Litigation rates in Britain and Spain (employment and social security claims - receipts per 1000 inhabitants).



Source: own elaboration with data from the UK Ministry of Justice and Spanish Consejo General del Poder Judicial ('CGPJ').

¹⁸⁶ S Corby and P L Latreille, 'The Role of Lay Members in Employment Rights Cases-Survey Evidence' (2011) <http://www2.gre.ac.uk/_data/assets/pdf_file/0012/611202/Survey-of-ET-and-EAT-judges-and-lay-members.pdf> accessed 19 August 2013, 40.

¹⁸⁷ *ibid* 12, 40. See an example of an equal pay case where the lay members had a key influence in the outcome in *Abendshine and others v Sunderland CC* [2012] ICR 1087 (EAT) [47].

¹⁸⁸ Statistics on discrimination claims are not disclosed in Spain, so no official data are available.

¹⁸⁹ Ministry of Justice, 'Tribunals Statistics Quarterly. January to March 2014' <<https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2014>> accessed 20 September 2014.

¹⁹⁰ TUC, *At what price justice?* (n 95) 7.

¹⁹¹ See further Ch 6.

As regards the procedure, the British system deals with all discrimination claims under a fairly uniform procedure,¹⁹² whilst different procedural modalities exist in Spanish law. Victims can decide¹⁹³ to bring a claim through the ‘regular procedure’¹⁹⁴ or through the ‘special procedure for the protection of fundamental rights’¹⁹⁵ (*fundamental rights procedure*). Both types of procedures are followed before Social Courts, but the fundamental rights procedure has a number of specialities: it has shorter terms and takes preference over pending regular proceedings;¹⁹⁶ the participation of a public prosecutor is mandatory¹⁹⁷ and the claimant can eventually appeal before the Constitutional Court through the exceptional ‘amparo procedure’, once all ordinary remedies have been exhausted.¹⁹⁸ The shift of the burden of proof applies in both types of procedures,¹⁹⁹ but the claim followed through the fundamental rights procedure cannot be joined to ordinary claims because the tribunal can only rule on the alleged violation of fundamental rights.²⁰⁰ Accordingly, the type of redress sought by the victim will largely determine the type of procedure.²⁰¹

¹⁹² There are some minor differences between equal pay cases and other types of discrimination claims, see eg the procedure for the assessment of work of equal value, Employment Tribunals (Equal Value) Rules of Procedure 2013, SI 2013/1237, sch 3, ss 5 ff.

¹⁹³ Article 177(1) of LJS states that ‘[a]ny person [...] can seek redress’ through the procedure for the protection of fundamental rights. See eg J L Monereo Pérez and J A Fernández Avilés, *Comentarios a la Ley de Procedimiento Laboral* (Comares 2001) 1064; J C Cabañas García, ‘La tutela jurisdiccional de los derechos fundamentales en el orden social’ [1994] Documentación Laboral 72. Whilst this is the majority opinion, some scholars consider that the special procedure must always be followed in claims concerning the violation of fundamental rights, see J Jiménez Sánchez, ‘Algunas reflexiones sobre la normativa reguladora de la modalidad procesal de tutela de la libertad sindical y otros derechos fundamentales’ [1996] La Ley, No 1436; F J Pozo Moreira, *La Tutela Judicial de las Nuevas Causas de Discriminación* (Andavira 2012) 270.

¹⁹⁴ Arts 76 ff LJS.

¹⁹⁵ Arts 177-184 LJS. This special procedure is rooted on article 53(2) CE and can only be used for claims founded on articles 14- 29 CE, among which, the right to equality and non-discrimination (art 14).

¹⁹⁶ Once the claim has been admitted, the parties need to be summoned in five days and the tribunal needs to give judgment within three days after the hearing; conciliation is still compulsory but it has to take place within seven days after the claim is admitted (art 181 LJS).

¹⁹⁷ Art 177(3) LJS.

¹⁹⁸ Art 43(1) Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional. See also E Carmona Cuenca, ‘El recurso de amparo constitucional y el recurso de amparo judicial’ [2006] Revista Iberoamericana de Derecho Procesal Constitucional 3-14.

¹⁹⁹ Art 96 LJS.

²⁰⁰ Art 178(1) LJS.

²⁰¹ M D Román de la Torre, ‘Proceso de Tutela de Derechos Fundamentales’ in J Folguera Crespo (dir), *El Proceso Laboral en la Jurisprudencia del Tribunal Constitucional* (Consejo General del Poder Judicial 1996) 197, 224-225. See also SSTC 90/1997 de 6 mayo; 191/1998 de 20 septiembre; 214/2000 de 18 septiembre; SSTC de 18 septiembre 2001 (RJ 2002/589); 3 febrero 1998 (RJ 1998/1430) and 14 noviembre 1997 (RJ 1997/8312).

Whilst the victim may seek redress either through the ordinary procedure or through the fundamental rights procedure, there are certain claims which must follow *other special procedures*,²⁰² even if they have a discriminatory element.²⁰³ This is often the case in dismissals²⁰⁴ or claims for the recognition of rights enabling the reconciliation of private and professional life.²⁰⁵ Hence, compared to the British system, the existence of different procedural modalities in Spain may be a hurdle for the claimant, who may have difficulties to select the most appropriate procedure. Spanish Courts can dismiss a claim brought under a wrong procedural modality,²⁰⁶ but the court has the duty to conduct the case under the most appropriate modality in view of the substance,²⁰⁷ if possible.

An analysis of recent case law suggests that the fundamental rights procedure is used in discrimination cases, if there is not a more specific procedural modality (eg the special procedure for dismissals) and the claim does not concern other additional issues.²⁰⁸ However, considering that it is very similar to the regular employment procedure –except for the peculiarities pointed out earlier– this thesis focuses on the analysis of the regular employment

²⁰² Art 184 LJS. These special procedures are, *inter alia*, dismissals and other forms of termination of work contracts, substantial amendments to working conditions, holidays, geographic mobility, rights enabling the reconciliation of private and professional life and procedures to contest collective agreements.

²⁰³ However, judicial and scholarly doctrine have developed the ‘integrative theory’ (*tesis integrativa*), according to which if a claim concerning fundamental rights needs to be followed through a *special procedure*, the court should apply the same procedural guarantees than in a *fundamental rights procedure* to avoid having different procedural standards for the protection of fundamental rights, see STS de 20 septiembre 2007 (RJ 2007/8304). See also F Valdés Dal-Ré, ‘El proceso de protección de la libertad sindical y demás derechos fundamentales’ in J Cruz Villalón and F Valdés Dal-Ré (eds), *Lecturas sobre la Reforma del Proceso Laboral* (Ministerio de Justicia 1991) 461; Román de la Torre (n 201) 214-215; Tolosa Tribiño C, ‘La Nueva Regulación del Proceso de Tutela en la Jurisdicción Laboral’ (2012) 12 *Revista de Derecho del Trabajo y de la Seguridad Social* 29, 33-34. This theory is now echoed in article 178(2) LJS.

²⁰⁴ See eg SSTSJ (Andalucía) 31 mayo 2012 (AS 2012/1864); (La Rioja) 7 mayo 2012 (AS 2012/2437); (Canarias) 1 abril 2012 (AS 2012/2430).

²⁰⁵ See eg SSJS (Pamplona) 366/2012 de 10 Octubre; (Madrid) 259/2012 de 19 Septiembre.

²⁰⁶ C R Ureste García, ‘Proceso Ordinario y Proceso Monitorio. Modalidades Procesales’, VIII Encuentro entre el Consejo General del Poder Judicial y el Consejo General de Colegios Oficiales de Graduados Sociales de España 2013 <www.graduadosocial.org/index.php?option=com_docman&task=cat_view&gid=82&Itemid=292> accessed 20 July 2013, 4.

²⁰⁷ Arts 102(2), 179(4) LJS.

²⁰⁸ This can be observed on a search on the discrimination case law between the years 2010 and 2012 in the Spanish Westlaw database.

procedure, but differences with the fundamental rights and the collective conflict procedures are pointed where relevant.

4.5 Conclusion

This chapter has introduced the historical and social background of British and Spanish racial equality legislation and policies, and has compared the substantive features of their equality legislation.

The analysis has revealed that British and Spanish perceptions about ethnic minorities are different. Whilst the Stephen Lawrence Enquiry helped raising awareness about racism and institutional discrimination suffered by ethnic minorities, the Spanish perception of ethnic minorities has not evolved much since the late 1990s:²⁰⁹ public debate is still framed around otherness and many Spaniards continue to deny the existence of racism:

In Spain there is a sort of fear to the word racism which ends up having adverse effects on the fight against racism [...] there is a tendency to prefer not to talk about racism, or use euphemisms. [C]ertainly we still think that “here we are not racist”.²¹⁰

Arguably, this perception is deeply embedded not only in the average citizen, but also in the subconscious mind of all kinds of legal enforcement professionals, ranging from police forces to the judiciary. In this regard, it is paradigmatic that none of the two key racial discrimination cases that have reached the Spanish Constitutional Court in the last years were successful at domestic level, whilst they were when they reached international instances.²¹¹

However, these different beliefs may also be the consequence of the different paths that anti-discrimination law has taken in Britain and Spain. Whilst 1970s ethnic conflicts triggered the adoption of the first anti-racist laws in Britain, in Spain it was the transition to a democratic regime, feminist movements

²⁰⁹ See eg R Zapata-Barrero and T A Van Dijk, *Discursos sobre la inmigración en España. Los Medios de Comunicación, los Parlamentos y las Administraciones* (CIDOB 2007); N Kressova and others, ‘Poniendo adjetivos a la inmigración. Observaciones sobre la imagen del colectivo inmigrante proyectada desde la prensa andaluza’ in C de Castro Pericacho (coord), *Mediterráneo migrante: tres décadas de flujos migratorios* (Universidad de Murcia 2010) 235; Sos Racismo, *Informe Anual sobre el Racismo en el Estado Español* (Tercera Prensa 2013) 200, 203. The same type of media discourse focusing on otherness and criminality exists around Roma, see Fundación Secretariado Gitano (‘FSG’), *Discriminación y Comunidad Gitana. Informe Annual 2012* (FSG 2012) 15, 19-36.

²¹⁰ Pajares (n 19) 36. Author’s translation.

²¹¹ *Muñoz Díaz v Spain* (n 144); *Williams Lecraft v Spain* (n 71).

and EU law which triggered the insertion of the first anti-discrimination provisions. From an institutional perspective, a key feature of Spanish equality legislation is that policy-makers have always given priority to sex discrimination, and more recently, to disability discrimination,²¹² whilst this is clearly not the case in Britain, especially after the harmonisation achieved with the EqA 2010. Hence, compared to British law, the Spanish legal framework is patchy and inconsistent, and racial equality legislation and policies are underdeveloped.

Nevertheless, the initial gap between British and Spanish equality law has nowadays been partly bridged thanks to the transposition of EU equality law. In particular, the RED has contributed to the approximation of discrimination definitions, but a detailed analysis shows that some differences remain, notably regarding the concept of indirect discrimination, but also as regards the definitions of direct discrimination and harassment. Undoubtedly, these substantive divergences can have an impact on the effectiveness of racial equality law, but the literature has already discussed their implications²¹³ and it is beyond the scope of this thesis to discuss them further. Instead, subsequent chapters focus on the comparative analysis of actual enforcement mechanisms. Chapter 5 picks up on the role of employment-specialist tribunals by analysing, inter alia, if *actio popularis* and other forms of collective standing can increase the effectiveness of formal procedures. As discussed earlier, fees are playing an important part in the reduction of tribunal claims in Britain, so Chapter 6 further analyses the extent to which ADR mechanisms can be an effective alternative and how filters (eg equality bodies, NGOs and trade unions) can best be utilised in a context of budget constraints. Finally, Chapter 7 examines the role of equality duties and strategies based on collective bargaining and businesses' policies to promote racial equality in Britain and Spain. That chapter will make the connection with the present one in highlighting that the different British and

²¹² CIDALIA, *Proyecto Todoimas. Foro 2011 para la igualdad de trato y la no discriminación. Cuaderno analítico* (Ministerio de Sanidad, Política Social e Igualdad 2011) 57.

²¹³ See eg D Schiek, 'Chapter Three. Indirect Discrimination' in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007) 323; M Ambrus, K Henrard, M Busstra, 'The Racial Equality Directive and Effective Protection against Discrimination: Mismatches between the Substantive Law and its Application' (2010) 3 *Erasmus Law Review* 165.

Spanish social perceptions –ie Semi-Autonomous Social Fields’ values–²¹⁴ about racism and ethnic minorities can have a significant influence on the effectiveness of employers’ equality policies.

²¹⁴ These are communities which create their own rules but are also sensible to external rules, see Ch 2, text to n 40-50.

Chapter 5. Formal enforcement: going to court

5.1 Introduction

As noted in Chapter 3, EU law leaves MS a large degree of autonomy to develop enforcement mechanisms for racial discrimination disputes.¹ However, MS must ensure that these mechanisms ‘are sufficiently effective’ to achieve the aims of the RED and ‘that they may be effectively relied upon before the national courts in order that judicial protection will be real and effective’.² This chapter focuses on three aspects which are crucial for the effective enforcement of racial equality law: active legal standing, the burden of proof test and remedies. *However, why are these aspects crucial?*

In legal systems based on individual enforcement, the responsibility to report discrimination rests on the victim,³ but legal standing rules can alleviate or exacerbate that burden. Typically, narrow standing rules will only grant victims the right to file complaints, whilst broad standing rules may also allow equality bodies and interest organisations to represent victims, and they may even allow them to initiate proceedings in their own names or in the absence of identifiable victims. This relieves victims from the onus of being the only ones who can act against discrimination and increases the potential of formal procedures to effectively address discrimination ex-post. For this reason, analysing British and Spanish locus standing rules is a crucial aspect to assess the effectiveness of their respective formal enforcement procedures.

The burden of proof has also a key influence on the ex-post effectiveness of racial equality law because once a claim is initiated, the next hurdle that the victim must face is proving discrimination, or at least, shifting the onus probandi to the

¹ See s 3.2.2.

² Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-05187, para 37. See also the Opinion of AG Maduro in the same case, where he stated that ‘the Directive lays down minimum measures, but that is no reason to construe its scope more narrowly than a reading in the light of those values would warrant. A minimum standard of protection is not the same as a *minimal* standard of protection. Community rules for protection against discrimination may leave a margin for the Member States to ensure even greater protection, but from that we cannot conclude that the level of protection offered by the Community rules is the lowest conceivable’, para 14.

³ See Ch 3, text to n 97.

respondent. It is widely acknowledged that discrimination tends to be very difficult to prove,⁴ so the purpose of the 'shift' of the burden of proof is, in a way, facilitating the task to the victim. Hence, identifying the British and the Spanish threshold required to shift the onus probandi to the respondent is also essential to evaluate the effectiveness of formal procedures.

The third element, remedies, is equally important because it can have an impact on the behaviour of both victims and employers. *Victims* may be encouraged or deterred to bring a claim depending on their options for reinstatement and compensation; *employers* may be dissuaded to discriminate depending on the compensation awards they may have to pay, and in some cases, remedies may also encourage them to end discriminatory policies.

The chapter starts by outlining EU law standards regarding active legal standing (5.2.1) and discussing whether British and Spanish standing rules can alleviate victims' burden to report discrimination (5.2.2). The analysis then turns to the thresholds for shifting the onus probandi to the respondent at EU level (5.3.1) and at national level, in Britain and Spain (5.3.2). Finally, the last part of the chapter discusses EU standards in the field of remedies (5.4.1) and whether British and Spanish remedies encourage or deter litigation (5.4.2).

5.2 *Active legal standing*

'Active legal standing' generally refers to the right to bring a claim (the right to stand, *stricto sensu*), but it can also be understood in broader terms to include aspects such as the right to represent the claimant or the right to intervene in proceedings.⁵ This section outlines the RED standards as regards active standing (5.2.1), and then analyses the extent to which British and Spanish legislation (5.2.2) on individual standing (5.2.2.1) and multi-party actions (5.2.2.2) contribute to the effectiveness of racial equality legislation.

⁴ See eg S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 283.

⁵ M Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (Eleven 2011) 189.

5.2.1 EU law: the divergence between substantive rights and standing rules

In line with the individual enforcement model which prevails in the RED,⁶ article 7(1) establishes that MS must grant active legal standing ‘to *all persons* who consider themselves wronged by failure to apply the principle of equal treatment *to them*’. That is, *victims* should obviously have the right to stand, but should MS grant standing to *other* natural or legal persons? For instance, should another person be able to act in place of the actual victim if the latter does not wish to take action for fear of being victimised? Or should an association be able to challenge an employer’s discriminatory statement where there is no identifiable victim?

If the expression ‘all persons’ is read in conjunction with recitals 16 and 19 of the RED, it becomes clear that it is entirely up to MS to give legal standing to *legal persons* ‘in accordance with their national traditions and practice’ and ‘without prejudice to national rules of procedure concerning representation and defence before the courts’. Indeed, from recital 19 and article 7(2) it follows that legal persons just need to be allowed to act ‘*on behalf or in support* of the complainant’. Whilst some scholars consider that this calls on MS to grant legal standing to interest organisations,⁷ it is submitted that it does not really oblige MS to grant legal persons the right to act *in the name* of the victim; but rather to allow them to represent (*act on that person’s behalf*) or *support* the victim, which leaves MS enough leeway to allow *only* legal, financial or moral *support*.

However, it could be argued that, when there is no identifiable victim, not granting legal persons standing to challenge a discriminatory statement, or an advertisement, could undermine the overall effectiveness of the RED. For instance, such statements can dissuade ethnic minorities from applying for a job with the employer concerned. In this regard, the CJEU has clarified that the RED’s concept of discrimination includes discriminatory behaviours with no identifiable victim,⁸ like public statements about a company’s recruitment policy.⁹ Consequently, the

⁶ See Ch 3.

⁷ Ambrus (n 5) 216, but cf C Brown, ‘The Race Directive: Towards Equality for all the Peoples of Europe?’ [2002] Yearbook of European Law 195, 219.

⁸ *Firma Feryn* (n 2) paras 23-25.

⁹ That was the case in *Firma Feryn*, where the director’s statements concerned any potential candidate, rather than a particular candidate, (n 2) para 16.

RED somewhat supports the possibility of recognising the right to *actio popularis* on a *substantive* level,¹⁰ but according to the CJEU ruling in *Firma Feryn*¹¹ article 7(2) does not establish a *procedural* obligation for MS to set up such procedures.¹²

In short, the RED obliges MS to grant standing to individual victims and to *at least* allow legal entities with legitimate interest *to support* victims in their claims, with their consent. MS do not need to grant legal standing to legal persons or equality bodies¹³ or allow class actions for groups of victims.

5.2.2 British and Spanish standing rules: alleviating victims' burden to report discrimination?

As in the RED, individual enforcement prevails in British and Spanish law. In both jurisdictions active legal standing is primarily granted to natural persons who have suffered discrimination. In Spain, the *Law of the Social Jurisdiction* ('LJS')¹⁴ explicitly refers to the 'titleholder of a subjective right or a legitimate interest';¹⁵ in Britain, both the EqA 2010 and the Explanatory Notes refer to the 'worker'¹⁶ and to the 'individual claimant'¹⁷ in relation to enforcement rights.¹⁸ Nevertheless, this section analyses: the extent to which British and Spanish law have developed mechanisms to overcome some of the limitations of individual enforcement (section 5.2.2.1), and the potential benefits of enabling class actions

¹⁰ This is in line with article 6(1) RED, which allows MS to adopt more favourable rules than the ones set up by the RED.

¹¹ *Firma Feryn* (n 2). A similar opinion was expressed in Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării* ECLI:EU:C:2013:275 regarding Council Directive (EC) 78/2000.

¹² *Firma Feryn* (n 2) paras 26-27, but cf with B Bodrogi, 'Legal Standing - The Practical Experience of a Hungarian Organisation' [2007] *European Anti-Discrimination Law Review* 23, 25; R Krause, 'Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV' [2008] *ECR I-5187* (2010) 47 *CMLRev* 917; Ambrus (n 5) 207.

¹³ Article 13(2) RED only refers to the duty of 'providing independent legal assistance to victims'.

¹⁴ Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social.

¹⁵ Art 17(1) Ley 36/2011, de 10 de octubre, reguladora de la Jurisdicción Social ('LJS'). The case law has clarified that neither trade unions nor associations can replace a victim in the role of claimant. See eg *STC 210/1994* de 11 julio as regards trade unions and *STSJ (País Vasco) 1 diciembre 1998* (AS 1998/7489) as regards associations. See also J Garberí Llobregat, *El nuevo proceso laboral* (Aranzadi 2011) 116-117; M Albiol Ortuño, *Derecho Procesal Laboral* (10th edn, Tirant lo Blanch 2013) 377.

¹⁶ EqA 2010, s 127.

¹⁷ EqA 2010; Explanatory Notes, para 406.

¹⁸ See also A McColgan, *Report on Measures to Combat Discrimination. Directives 2000/43/EC and 2000/78/EC. United Kingdom* (MPG 2011) 145-148; N Bamforth, M Malik and C O'Cinneide, *Discrimination Law: Theory and Context* (Sweet & Maxwell 2008) 1254-1255.

and public interest litigation –in particular through the analysis of the Spanish ‘collective conflict’ procedure (section 5.2.2.2).

5.2.2.1 Individual claims

Although individual litigation remains the main enforcement mechanism both in Britain and Spain, allowing victims to be *represented* by legal persons can help them overcome some of the fears and costs which lead to social lumping (ie to not taking action). In addition, enabling the participation of expert organisations as *interveners* in the proceedings can improve courts’ understanding of the facts and/or the law, and thus minimise the problem of institutional lumping (ie difficulties to access justice derived from the legal system itself). For these reasons, this subsection analyses the availability of these options in Britain and Spain.

Representation

Unlike the Spanish Racial Equality Council (‘SREC’),¹⁹ the British Equality and Human Rights Commission (‘EHRC’) can represent victims.²⁰ However, whilst the former Commission for Racial Equality (‘CRE’) provided full representation for 1,750 cases per year, on average, between 1994 and 1998,²¹ the figure went down to 23 cases in 2006,²² right before the merger of the three commissions, and nowadays is limited to cases which match the EHRC strategic objectives,²³ which obviously reduces its relevance for the vast majority of cases. On the other hand, however, the fact that the EHRC accepts to represent a victim brings attention to that case and sends a signal that an important legal development may be at stake.

Besides equality bodies, other types of organisations may also represent victims. Although British law does not provide express rights for trade unions and NGOs to bring discrimination claims in the name of the victim, they can act *in support* of victims, which may involve providing legal advice, facilitating access to

¹⁹ According to the SREC, this is one of the aspects which should be considered for amendment in the future; Interview with Secretaría de Estado de Igualdad, SREC (Madrid, Spain, 30 April 2013).

²⁰ EqA 2006, s 28. See eg a case where the former Disability Rights Commission represented the victim *Stockton on Tees BC v Aylott* [2010] ICR 1278 (CA); *Prison Service v Beart (No 2)* [2005] ICR 1206 (CA).

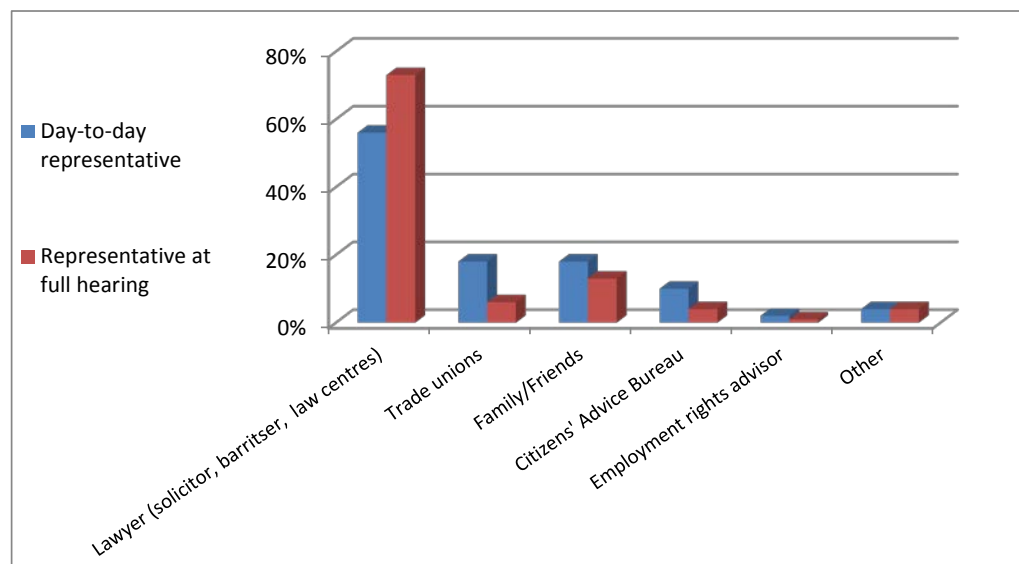
²¹ J Clarke and S Speeden, *Then and Now: Change for the Better?* (CRE 2001) 31.

²² CRE, *Annual Report and Accounts 2006/07* (TSO 2009) 17.

²³ Interview with Wendy Hewitt, Deputy Legal Director, EHRC (London, UK, 29 March 2013).

a qualified lawyer, financial support, and offering legal representation.²⁴ Indeed, although lawyers tend to be the main source of claimants' advice and representation, Figure 4 shows the remarkable role played by trade unions and Citizens' Advice Bureaux ('CAB').²⁵

Figure 4. Who acts as the advice and representation of employment tribunal claimants in Britain.



Source: SETA 2013.

Unlike British law, Spanish law expressly empowers *trade unions* to represent their members individually in employment proceedings, including discrimination claims.²⁶ However, this power does not extend to NGOs because 'legal entities legally authorised to defend legitimate collective rights and interests' can only engage in judicial proceedings on behalf of the complainant²⁷ in areas *outside* employment. Consequently, although both British and Spanish interest organisations provide advice and legal assistance to victims, in Spain, they cannot represent victims,²⁸ so victims are represented in the name of NGOs' in-house

²⁴ Cf McColgan (n 18) 146.

²⁵ See eg *Essa v Laing Ltd* [2004] ICR 746 (CA); *Derbyshire v St Helens Metropolitan Borough Council* [2007] ICR 841 (HL); *Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] ICR 1348 (EAT); *Martin v Devonshires Solicitors* [2011] ICR 352 (EAT).

²⁶ Art 20(1) LJS. This is also backed by article 7 of the Spanish Constitution ('CE') which recognises trade unions as legal entities which can defend and promote the interests of workers. The victim's consent is required, but it is presumed, see art 20(2) LJS. See also SSTs de 2 febrero 2000 (RJ 2000/1438); 11 diciembre 2000 (RJ 2000/808). For examples of trade unions' representation see SSTSJ (Asturias) 9 mayo 2003 (AS 2003/229062); (Asturias) 9 mayo (AS 2003/3646).

²⁷ Ley 62/2003, art 31.

²⁸ Otherwise, they could breach professional encroachment rules, which is a criminal offence under articles 403 and 638 of the Criminal Code (Ley Orgánica 10/1995, de 23 de noviembre, del

lawyers,²⁹ or they are redirected to external lawyers or trade unions. For instance, the association *Sos Racismo Aragón* and the trade union CCOO were contacted by an employee who was suffering racial and religious discrimination at work. Whilst both entities provided support through the whole process, the victim could only be represented by CCOO, whose in-house lawyers attended the hearing before the employment court.³⁰

The fact that trade unions may represent Spanish claimants, but interest organisations may not, can seem irrelevant from a practical point of view, but sometimes it may be preferable for victims to be represented by an interest organisation –or an equality body. Unions may have the advantage of being ‘insiders’ and knowing the context of the conflict at stake, but their litigation strategies can be influenced by their own interests,³¹ broader political considerations, on-going negotiations, etc,³² whilst NGOs are generally ‘outsiders’, so their advice will be inherently more neutral. Furthermore, the fact that the name of an interest organisation appears in the claim is not just a formal issue: it may add a collective element to the proceedings and emphasise that the victim belongs to and is supported by a particular group.³³ This can be crucial in individual claims which are just the tip of the iceberg of a systemic problem.³⁴ For instance, if a Roma graduate is not hired for a position he is qualified for due to his Roma origin, the fact that he is directly represented by a Roma organisation may render more visible the victim’s belonging to that group. If it is publicised, it may also shame the company, raise awareness about the problem, and ultimately, boost the ex-ante effectiveness of racial equality law.

Código Penal); A Murcia Clavería, *La representación voluntaria en el proceso laboral* (Marcial Pons 1994) 51, 270.

²⁹ Interview with Katrina Belsué Guillorme, Helpdesk Manager, *Sos Racismo Aragón* (Zaragoza, Spain, 29 April 2013).

³⁰ *ibid*; interview with Ana Belén Budría Laborda, In-house Lawyer at CCOO (Zaragoza, Spain, 6 September 2013); SJS (Zaragoza) 105/2013 de 15 marzo. See another example in *Sos Racismo, Informe Annual sobre el Racismo en el Estado Español 2010* (Gakoa 2010) 184.

³¹ Interview with Robin Allen QC, Cloisters Chambers (London, UK, 15 February 2013).

³² T Colling, ‘Trade Union Roles in Making Employment Rights Effective’ in L Dickens (ed), *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Hart 2012) 197.

³³ Ambrus (n 5) 217.

³⁴ Murcia Clavería (n 176) 275.

Nevertheless, the wider scope of British representation rules may be partly neutralised by recent cuts to the EHRC's budget and grants programme.³⁵ Indeed, law centres and CABs have already expressed concerns about their increasing difficulties to represent claimants.³⁶

Third party interventions

In both jurisdictions legal entities can apply to intervene in discrimination proceedings,³⁷ but the purpose of the interventions is different. Whilst in Spain the intervener must support the claimant and refrain from harming his interests,³⁸ in Britain the intervener is as 'friend of the court', who can support the claimant, the defendant³⁹ or take a more neutral position. He impartially assists the court⁴⁰ and brings 'legal arguments that might otherwise not be put'.⁴¹ For this reason, whilst the British intervener needs the leave of the tribunal,⁴² and the claimant and the defendant may oppose the intervention,⁴³ Spanish legal entities with an interest in defending discrimination victims have *the right* to intervene and only the claimant may oppose.⁴⁴ But although the concept of intervention is more neutral in Britain than in Spain, in practice, the most frequent intervener, ie the EHRC, often supports the claimant.⁴⁵

Unlike the SREC, which is not entitled to intervene,⁴⁶ the EHRC can intervene in discrimination proceedings 'if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has

³⁵ See eg S Brett, *Two Steps Forward, One Step Back. How the Coalition Government is Dismantling our Equality Infrastructure* (TUC 2012) 14-15.

³⁶ For instance, the Lambeth Law Centre has no longer funding for employment casework, so they have limited possibilities to provide representation, <www.lambethlawcentre.org/employment> accessed 20 July 2013; see also Ch 6, text to n 57-59.

³⁷ Note, however, that in Spain they can only do it under the fundamental rights procedure.

³⁸ In fact, in Spain the intervener is called *coadyuvante*, which means someone who assists or contributes to achieve something, STC 257/2999 de 30 octubre. See also I García Murcia and P Menéndez Sebastián, 'La tutela de la libertad sindical y la intervención del sindicato como coadyuvante [2001] Repertorio Aranzadi del Tribunal Constitucional 2030.

³⁹ See eg *X v Mid Sussex Citizens Advice Bureau* [2013] ICR 249 (SC) [6].

⁴⁰ *Re Northern Ireland Human Rights Commission* [2002] UKHL 25 [72] (Lord Hobhouse).

⁴¹ S Shah, T Poole and M Blackwell, 'Rights, Interveners and the Law Lords' (2014) 34 OJLS 3.

⁴² See eg *Oyarce v Cheshire CC* [2008] ICR 1179 (CA). See also McColgan (n 18) 153.

⁴³ *ibid* 154.

⁴⁴ Art 177(2) LJS.

⁴⁵ See eg *Essa v Laing Ltd* [2004] ICR 746 (CA); *Derbyshire v St Helens Metropolitan BC* [2007] ICR 841 (HL).

⁴⁶ Under the fundamental rights procedure 'public and private entities seeking to promote and defend the interests of the affected persons' (art 177(2) LJS), but the SREC lacks legal personality. Note, however, that a Public Prosecutor always participates in fundamental rights proceedings.

a function'.⁴⁷ The EHRC can intervene at its own initiative, at the request of the claimant's representative or an interest organisation,⁴⁸ or at the request of the tribunal, as it was the case in *Pothecary*.⁴⁹ In that case, the main issue was whether the two stage burden of proof test applied to victimisation in the context of sex discrimination, so the role of the EHRC was bringing highly specialised legal knowledge, which the tribunal might have ignored otherwise.⁵⁰ In particular, the EHRC managed to persuade the tribunal that the reverse burden of proof should apply to sex victimisation claims on the basis of a joint interpretation of the Burden of Proof Directive and British case law on the implementation of EU law.⁵¹ The EHRC's interventions may also contribute to interpreting national law in line with EU law, international law or other national legal orders.⁵² In *Oyarce*, for instance, the EHRC argued that section 54A of the Race Relations Act 1976 had to be interpreted in accordance with the general principles of EU law.⁵³ In *Mid Sussex* the EHRC referred to several recommendations of the former French equality body to argue that certain volunteers should fall within the scope of Directive 2000/78, and thus within the Disability Discrimination Act 1995.⁵⁴ The EHRC can also give a different twist to the interpretation of the facts which can 'contribute to the court's total understanding' of the case.⁵⁵ For example, in *Mid Sussex* the EHRC maintained that, in that case, the service provided by volunteers was *de facto* indistinguishable to the service provided by real employees.⁵⁶

⁴⁷ EqA 2006, s 30. The EHRC and the former CRE have intervened in many landmark cases in the field of employment, but between 2008 and 2012 most interventions in the field of racial discrimination concerned the equality duty and/or judicial review, see EHRC, 'Summary of Commission's interventions (updated June 2012)' <www.equalityhumanrights.com/legal-and-policy/strategic-human-rights-and-equality-litigation> accessed 22 July 2013.

⁴⁸ See the 'Request for Commission Assistance or Intervention Form' <www.equalityhumanrights.com/legal-and-policy/strategic-human-rights-and-equality-litigation> accessed 22 July 2013.

⁴⁹ *Pothecary Witham Weld v Bullimore* [2010] ICR 1008 (EAT) [6].

⁵⁰ See at this respect D Doherty, 'Third party interventions in public interest litigation' (PILA 2011) 1 <www.pila.ie/bulletin/2011/june/15-june-2011/third-party-intervention-strategies-a-pils-project-presentation/> accessed 20 August 2013.

⁵¹ *Pothecary* (n 49) [37]- [42].

⁵² See also EHRC, 'Strategic litigation policy 2012-13, Appendix 2' <<http://www.equalityhumanrights.com/legal-and-policy/legal-strategy/>> accessed 20 August 2013.

⁵³ *Oyarce* (n 42) [47]-[49].

⁵⁴ *Mid Sussex* (n 39) [51].

⁵⁵ D L Shapiro, 'Some thoughts on intervention before courts, agencies, and arbitrators' (1967-1968) 81 Harvard Law Review 721, 746.

⁵⁶ *Mid Sussex* (n 39) [22].

Besides equality bodies, trade unions and interest organisations are also allowed to intervene –but in Spain their participation is limited to the fundamental rights procedure.⁵⁷ However, in both jurisdictions, trade unions act more often as legal representatives of the claimant than as interveners, and the number of interventions from interest organisations is also low, which may be due to a lack of information about relevant cases and/or to a lack of expertise about how to intervene.⁵⁸ Furthermore, considering that interest organisations have limited resources, potential costs may have a ‘chilling effect’ on their decision to intervene.⁵⁹ For instance, in *Mid Sussex* several organisations wanted to be heard, but only one of them intervened with a written submission, whilst three others participated indirectly by sending their views to the solicitor of the defendant, who reported their opinions to the Supreme Court (‘SC’).⁶⁰

Overall, the Spanish system of intervention can be helpful to rebalance the power relationship between the parties. However, the British system can bring not only that same benefit, but also the benefit of allowing tribunals to request an intervention to improve their understanding of the facts or the law to supplement their lack of technical knowledge on discrimination tests with external expertise.

5.2.2.2 Multi-party actions and public interest litigation

Multi-party actions enabling several individuals to stand together in judicial proceedings exist both in Britain and Spain, but the availability of class actions in employment proceedings is limited.⁶¹ Hence, the main option for multi-party

⁵⁷ Art 177(2) LJS. In Spain, trade unions are exempted from litigation costs but they can only intervene: (a) when the claimant belongs to the union or (b) when the trade union is ‘the most representative’

⁵⁸ Public Law Project, *Third Party Interventions in Judicial Review. An Action Research Project* (np 2001) vi.

⁵⁹ T McGleenan refers to the ‘chilling effect’ a possible award of costs on interveners, ‘Strategic Interventions in Public Interest Litigation: Practice and Procedure’ (PILS Project Seminar, PILS, Law Society House, 10 May 2011) <www.pila.ie/bulletin/2011/june/15-june-2011/third-party-intervention-strategies-a-pils-project-presentation/> accessed 20 July 2013. The Public Law Project claims that interest organisations fear the ‘potential liability for other parties’ increased costs as a result of making an unsuccessful intervention’ and argues that a ‘no cost’ presumption should be established, *ibid*, vi-vii. In fact, in the field of education the case *R (E) v Governing Body of JFS* [2010] IRLR 135 (CA) confirms that interveners can be required to contribute to the claimant’s costs; see E Metcalfe, *To Assist the Court. Third Party Interventions in the UK* (JUSTICE 2009) 10.

⁶⁰ The Christian Institute was the only NGO intervening in the case, *Mid Sussex* (n 39) [6].

⁶¹ In Britain representative actions are allowed for other types of proceedings, see Civil Procedure Rules 1998, SI 1998/3132, part 19. See also J A Jolowicz, ‘Representative Actions, Class Actions

litigation in employment proceedings are joint individual claims, which enable three or more claimants to bring a unique claim when their action is based on the same set of facts.⁶² In the last years, joint claims have exponentially risen in Britain,⁶³ a phenomenon that some scholars link to the limitations of the individual enforcement model for addressing effectively employment disputes.⁶⁴ Thus, this subsection seeks to determine if joint claims are effective tools to address discrimination ex-post, or if recourse to class actions or *actio popularis* could be more beneficial.

Arguably, in some respects, joint actions share some of the advantages of class actions: both allow victims to pull together resources and share litigation fees.⁶⁵ Furthermore, as opposed to individual claims, the fact that a group of persons presents evidence of discrimination may strengthen the substance of the complaint in view of shifting the burden of proof to the respondent.⁶⁶ Finally, acting together, victims may fear less victimisation and they may bear better the anxiety caused by litigation,⁶⁷ which can help reduce the ratio of withdrawn claims.

However, for discrimination disputes, joint actions may be more effective than class actions for at least two reasons. One of the challenges of class actions is determining who belongs to the 'class', and discrimination disputes are not an exception: it can be difficult to draw the line to determine who was actually discriminated against. For instance, in a selection procedure which was racially discriminatory, who would belong to the class: all the applicants belonging to

and Damages –A Compromise Solution?' (1980) 39 Cambridge Law Journal 237; N Andrews, 'Multi-party Proceedings in England: Representative and Group Actions' (2001) 11 Duke Journal of Comparative and International Law 249.

⁶² Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237 ('ETRP') s 9; art 25(3) LJS; Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, art 72.

⁶³ See Ministry of Justice, 'Tribunal statistics quarterly: January to March 2014' (12 June 2014) <<https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2014>> accessed 10 September 2014, Table E.1.

⁶⁴ See eg T Colling, 'Trade Union Roles in Making Employment Rights Effective' in L Dickens (ed), *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Hart 2012) 183, 184.

⁶⁵ For instance, in England and Wales there are three levels of fees, depending on the number of people named in the claim form, see HM Courts & Tribunal Service, 'Employment tribunal fees for groups and multiples' (2013) T436.

⁶⁶ P Ratcliffe, *'Race', Ethnicity and Difference. Imagining the Inclusive Society* (Open UP 2004) 153. See also Ambrus (n 5) 201.

⁶⁷ Interview with Sara Giménez Giménez, Lawyer, Equality Director at FSG (Huesca, Spain, 23 April 2013).

ethnic minorities or only those who were rejected? And should those who were deterred from applying also be included?⁶⁸ Furthermore, whilst in joint claims *all* the individual victims are parties in the claim, in class actions only the ‘*representative claimant*’ is a party.⁶⁹ Hence, in class actions it is not possible to differentiate between ‘*class members*’: they are all bound by the outcome, even if they did not actively participate in litigation.⁷⁰ Conversely, joint claims have the advantage of enabling the tribunal to take into account not only the common elements of their claims but also the differing ones,⁷¹ so that remedies can be adjusted to each victim’s circumstances.⁷² That was the case in several equal pay cases in Britain, where the claimants identified different comparators, despite bringing a joint claim.⁷³ For these reasons, joint claims may be better suited to the peculiarities of anti-discrimination law than class actions. In this regard, Robin Allen explains that discrimination is always suffered by the *individual*, so even if several victims are in similar situations, there will always be differences which cannot be particularised with class actions, which may lead to ‘satellite litigation’.⁷⁴

The other possible alternative to joint claims are *actio popularis*. Although they do not properly exist in British nor in Spanish employment law, the Spanish ‘collective conflict’ procedure allows trade unions to stand before employment courts to defend the interests of a ‘generic group of workers’,⁷⁵ even with no identifiable victim.⁷⁶ In that regard, the collective conflict procedure has significant

⁶⁸ Example inspired by D Pannick, ‘Class actions and discrimination law’ (1982) 10 *Journal of Ethnic and Migration Studies* 16, 20.

⁶⁹ R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart 2004) 3.

⁷⁰ However, there may be mechanisms to opt-in or opt-out, see further Mulheron (n 69) 23-45.

⁷¹ See eg *Graene Hamilton v NHS Grampian* [2011] UKEAT 0067/10, where the EAT stated that: ‘whilst multiple claimants may use a single form if their claims do arise out of the same set of facts, they must nonetheless present “their claims” in the ET1. That is, it requires to be clear from the form what each claimant avers as having happened in their own case and what remedy each of them is seeking. If they do not do so, then they cannot be said to be presenting “their claims”’ (at 33).

⁷² Lord Woolf has noted that ‘there may be many claimants with similar complaints but their claims may be more satisfactorily dealt with, at least in part, in separate proceedings’, Lord Woolf, *Access to Justice: Final Report*, (Lord Chancellor’s Department 1996) ch 17 at 16. See further criticisms to class actions in Andrews (n 61); C Hodges, ‘Multi-Party Actions. A European Approach’ (2001) 11 *Duke Journal of Comparative and International Law* 321, 343.

⁷³ *Graene Hamilton* (n 71) [14]-[20]. See also *Abendshine v Sunderland CC* [2012] ICR 1087 (EAT) [1] the EAT explains that before the ET 46 out of 250 victims had not identified a comparator.

⁷⁴ Interview with Robin Allen QC, Cloisters Chambers (London, UK, 15 February 2013).

⁷⁵ Arts 17(2), 153(1) LJS.

⁷⁶ STC 41/1999 de 22 marzo; STS 4 May 2000 (RJ 2000, 4266).

similarities with *actio popularis* because it allows unions to defend the worker's general interests. But has the collective conflict procedure any advantage in terms of the effectiveness of racial equality law, or can the same be achieved in Britain through joint claims?

Arguably, the Spanish collective conflict procedure can bring two key benefits for the enforcement of racial equality law. Firstly, the fact that the claimant is the trade union and not a group of individual victims, as in joint claims, can be extremely useful to avoid retaliation, because victims do not need to be identified. For instance, the trade union *Confederación General de Trabajadores* ('CGT') initiated a collective conflict against Fasa-Renault for not hiring any woman during a certain time period and hiring 120 men instead, whilst it had committed to hire 50 women. The defendant maintained that CGT did not have *locus standi* because no real victim was identified. However, the SC explained that discrimination in access to employment can either directly affect a concrete person or manifest as a generic denial to employ specific groups of workers. Whilst the first type of discrimination is individual, the second one affects a generic group of workers who are not personally identifiable but can be determined through objective data which differentiate them from other groups.⁷⁷ Secondly, for the same reason, it can also be a powerful tool to tackle institutional or systemic discrimination ex-ante. For instance, a trade union initiated a collective conflict for discrimination against Iberia for opening a competition for temporary staff with the requirements of, *inter alia*, being 'good looking' (*adecuada presencia*) and being aged between 18 and 25 years old. Whilst Iberia claimed that the right not to be discriminated belongs to the individual and thus a trade union could not have *locus standi*, the SC ruled that a collective interest could be clearly identified: the interest of all the individuals who *in abstracto* did not fit the Iberia requirements, and thus, the collective conflict procedure was appropriate to deal with the matter.⁷⁸

Nevertheless, collective conflicts also have pitfalls compared to joint claims: whilst the latter favour the award of remedies tailored to each individual victim,

⁷⁷ STS de 18 febrero 1994 (RJ 1994/1061) FJ 4; note however that a dissenting opinion supported the CGT arguments. See also the follow up of the case in SSTs de 4 octubre 1995 (RJ 1996, 1292); 4 mayo 2000 (RJ 2000, 4266).

⁷⁸ STS de 25 enero 1999 (RJ 1999\897) FJ 3.

the former cannot be easily individualised because the collective element is inherent to the claim.⁷⁹ For this reason, most collective conflict judgments need to be executed to individualise the award of remedies,⁸⁰ which requires starting an entirely new judicial procedure.⁸¹

The Spanish concept of ‘collective conflict’ has no equivalence in Britain. However, the EHRC has *locus standi* ‘in a number of situations where individuals may not be able or willing to take action’,⁸² ie to apply for injunctions.⁸³ Hence, allowing the EHRC to challenge situations where a group of workers is affected *in abstracto* by a discriminatory practice could be a feasible option to introduce in Britain the advantages of the Spanish collective conflict procedure.⁸⁴

5.3 Burden of proof

According to article 8(3) of the RED the shift of the burden of proof applies to any type of enforcement procedure, *except for* criminal procedures. This section introduces EU law standards in this field (subsection 6.4.1) and analyses the extent to which British and Spanish burden of proof tests may limit the ex-post effectiveness of racial equality law (subsection 6.4.2).

5.3.1 EU law standards: three levels of scrutiny

Article 8(1) of the RED sets up the burden of proof rule as a two stage procedure whereby when the applicant manages to establish facts ‘from which it may be presumed that there has been direct or indirect discrimination’ (*first stage*), it will be ‘for the respondent to prove that there has been no breach of the

⁷⁹ M R Alarcón Caracuel, ‘Capítulo VIII. Del Proceso de Conflictos Colectivos’ in J A Folguera Crespo, F Salinas Molina and M L Segoviano Astburuaga (dirs), *Comentarios a la Ley Reguladora de la Jurisdicción Social* (2nd edn, Lex Nova 2011) 594, 598-599.

⁸⁰ Note, however, that the Spanish Constitutional Court has recognised that, depending on the type of collective conflict, judgments may be directly executable, STC 92/1988 de 23 mayo. However, Spanish Courts have not been eager to individualise the award of remedies, see *ibid*, 605.

⁸¹ See arts 239-247 LJS.

⁸² Bob Hepple, ‘Agency Enforcement of Workplace Equality’ in L Dickens (ed), *Making Employment Rights Effective* (Hart 2012) 58.

⁸³ EqA 2006, s 24(1). Initially, the EHRC could also file complaints against discriminatory employment advertisements or instructions to discriminate (EqA 2006, s 25), but this power was repealed by EqA 2010, sch 27(1) para 1.

⁸⁴ See C O’Cinneide, ‘The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times’ (2007) 36 ILJ 141, 157.

principle of equal treatment' (*second stage*).⁸⁵ Whilst MS can implement this provision 'in accordance with their national judicial systems',⁸⁶ they must make the necessary adjustments to ensure the effectiveness of the principle of equality.⁸⁷

In this regard, the CJEU has provided guidance as to how this test should be applied in practice.⁸⁸ The burden of proof is not really inverted, but rather distributed between the parties⁸⁹ because it is first 'for the person alleging facts in support of a claim to adduce proof of such facts'.⁹⁰ Hence, at the first stage, the claimant needs to establish facts from which 'a presumption of discrimination' can be derived⁹¹ and for these purposes, he can rely on 'any form of allowable evidence'.⁹² However, the strength and consistency of evidence required to establish a *prima facie* case of discrimination may vary depending on the factual circumstances of the case. The level of scrutiny of the court needs to be nuanced according to 'the wider factual context' of the case:⁹³ there may be situations where it can be particularly challenging for the claimant to establish even a tenuous evidence of discrimination, but on the other hand, a *prima facie* case of

⁸⁵ See also Cases C-127/92 *Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535, paras 13-14; Case C-196/02 *Nikoloudi v Organismos Tilepikoinonion Ellados AE* [2005] ECR I 1789, para 68; Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-56603, para 54; Case C-104/10 *Kelly v National University of Ireland* [2011] ECR I-06813. This rule does not apply in criminal proceedings (art 8(3) RED) and MS are not obliged to adopt it either in 'proceedings in which it is for the court or competent body to investigate the facts of the case' (art 8(5) RED).

⁸⁶ Art 8(1) RED.

⁸⁷ Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Danfoss* [1989] ECR 31991, para 14.

⁸⁸ This study is limited to racial discrimination, but the CJEU case law on other protected grounds will also be taken into account because it is virtually identical, see cf art 8(1)-(2) RED; art 10(1)-(2) Council Directive (EC) 2000/78; Parliament and Council Directive (EC) 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23 ('Recast Directive'), art 19(1)-(2). Note also that case law based on the former Burden of Proof Directive (Council Directive (EC) 97/80 of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1997] OJ L014/06) is still good law under the Recast Directive (Case C-415/10 *Meister v Speech Design Carrier Systems GmbH* ECLI:EU:C:2012:217, para 40).

⁸⁹ However, this distribution is not necessarily balanced between the claimant and the respondent. As Ambrus argues there is no real 'shift' of the burden of proof, because the applicant still bears the 'initial burden of production' of evidence. Strictly speaking, the burden of proof is not 'shared' either, because once a *prima facie* case of discrimination is established, the respondent bears the 'burden of persuasion'. Hence, I agree with Ambrus' suggestion that the burden of proof in discrimination cases is simply *different* from the general rules of the burden of proof, (n 5) 26-30.

⁹⁰ *Enderby* (n 85) para 13; Case C-381/99 *Brunnhöfer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, para 52.

⁹¹ *Firma Feryn* (n 11) para 30.

⁹² *Brunnhöfer* (n 90) para 50.

⁹³ *ibid*, para 36.

discrimination should not be derived from any bald statement that someone has suffered discrimination. Consequently, courts need to find a balance between protecting potential victims and respecting employers' decision-making powers.⁹⁴

Depending on the factual background, the CJEU's suggested level of scrutiny in the first stage can be grouped in three main categories:

The general case

The CJEU clearly stated in *Brunnhofers*⁹⁵ that it is still for the claimant to prove that he suffered (a) a less favourable treatment (direct discrimination) or a disadvantage (indirect discrimination),⁹⁶ (b) in respect of a comparator who is in a similar situation and (c) that the difference in treatment 'can be explained only by' ⁹⁷ the alleged discriminatory ground.⁹⁸ Hence, the burden borne by the claimant is still quite high: finding an appropriate comparator⁹⁹ and proving that the disadvantageous treatment was racially motivated can be difficult tasks.¹⁰⁰

Cases with a lower level of scrutiny

In cases of covert discrimination or where the claimant lacks some key information, the CJEU has set a lower threshold to establish the existence of a *prima facie* case of discrimination. For instance, the CJEU has recognised that the level of scrutiny in the first stage should be lower when the internal policies are not transparent (ie that the pay structure is not publicly available)¹⁰¹ and when information about recruitment procedures is not available. This was at stake in *Kelly and Meister*, where the CJEU ruled that EU law does not oblige to disclose

⁹⁴ *Meister* (n 88), AG Mengozzi Opinion, delivered on 12 January 2012, paras 32-34. Author's italics.

⁹⁵ *Brunnhofers* (n 90) paras 58 and 60.

⁹⁶ Whilst *Brunnhofers* concerned indirect discrimination claims, the same requirements can apply *mutatis mutandis* to direct discrimination claims, *ibid*.

⁹⁷ *ibid*.

⁹⁸ In this vein see Case C-132/11 *Tyrolean Airways v Betriebsrat Bord der Tyrolean Airways* ECLI:EU:C:2012:329, where the CJEU dismissed the existence of age discrimination because the differentiation criterion was not 'inextricably linked' to the age of employees, but to the date of recruitment (paras 29-30). See also *Coleman* (n 85).

⁹⁹ S Prechal, 'Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes' (2004) 41 CMLRev 533, 543-545; A McColgan, 'Cracking the comparator problem: discrimination, "equal" treatment and the role of comparisons' [2006] EHRLR 650.

¹⁰⁰ See eg D Renton, *Struck Out. Why Employment Tribunals Fail Workers and What Can be Done* (Pluto Press 2012) 69-85.

¹⁰¹ *Danfoss* (n 87) para 13. See also Case 318/86 *Commission v France* [1988] ECR 3559, paras 26-27.

information about recruitment procedures,¹⁰² but the fact that the employer refuses to reveal such information could be taken into account to establish a *prima facie* case of discrimination.¹⁰³

Overt discrimination cases

A third type of situation concerns cases where discrimination is so obvious, that the CJEU considers it appropriate to bypass the first stage of the burden of proof test. For instance, if the employer overtly declares the discriminatory practice or when the criterion on which the differentiation is based is not disputed,¹⁰⁴ it may be acceptable to shift the onus probandi directly to the employer. That was the case in *Draehmpaehl*, where the discriminatory nature of a job advertisement which was *explicitly* directed *only* to women was not disputed.¹⁰⁵ Similarly, in *Firma Feryn* the employer had publicly stated that he was not willing to hire immigrants, which was enough for the CJEU to declare that the referred statement amounted to direct discrimination.¹⁰⁶

5.3.2 British and Spanish rules to shift the onus probandi to the respondent: a nearly-impossible task?

The British and Spanish equivalent to the two stage burden of proof test developed at EU level can respectively be found in section 136(2) of the EqA 2010, and articles 96(1) of the LJS and 40(1) of Law 62/2003.¹⁰⁷ Nevertheless, British

¹⁰² *Kelly* (n 85) para 34, 38;

¹⁰³ *Meister* (n 88) para 47. This ruling is in line with AG Mengozzi's opinion in *Meister* (n 94) and with its own judgment in *Kelly* (n 85) para 39.

¹⁰⁴ In cases where individuals in comparable situations were treated differently and the differentiation criterion was undoubtedly based on age, the measure was found to be directly discriminatory. See eg Cases C13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467, paras 33-34; C-297/10 and C-298/10 *Hennigs v Eisenbahn-Bundesamt* [2011] ECR I-7965, paras 58-59; Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687, paras 49-50.

¹⁰⁵ Case C-180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195, paras 12-15.

¹⁰⁶ *Firma Feryn* (n 11) paras 25, 31-34. Note, however, that the ECtHR seems to have a stricter approach to public statements, see *Nachova v Bulgaria* App Nos 43577 /98 and 43579/98 (ECtHR, 6 julio 2005).

¹⁰⁷ In both jurisdictions these provisions apply not only to discrimination, but also to harassment and victimisation. In Britain, section 136(2) 'applies to any proceedings relating to a contravention of [the EqA]', except for offences (EqA 2010, s 136(1)-(5)). However, before the adoption of the EqA 2010 the two stage test did not apply for discrimination on the grounds of colour or nationality, see *Abbey National plc and anor v Chagger* [2009] ICR 624 (EAT); *Edozie v Group 4* [2009] ICR 124 (EAT). The Spanish provision strictly refers to 'discrimination', but courts have consistently held that the shift in the burden of proof also applies to harassment and victimisation claims.

and Spanish courts have emphasised that a mere *allegation* of discrimination is by no means sufficient to shift the burden of proof to the respondent.¹⁰⁸ The claimant needs to present evidence of discrimination, but –theoretically, at least– it does not need to be *conclusive* evidence. Indeed, as Renton has put it:

[t]he general idea of a reverse burden [...] is that where a claimant shows there is a *possible or good case to answer* (say, that their case has a 25 per cent chance of success), the burden moves to the other party. There is still ultimately a 51 per cent hurdle, but now it rests against the defending party to refute the claim.¹⁰⁹

Whilst British tribunals and Spanish courts use different terminology, they both require proving the discriminatory conduct with at least a certain degree of probability. British tribunals require the claimant to prove on a ‘*balance of probabilities*’ facts from which the tribunal *could conclude* [...] that the employer has committed an act of discrimination’.¹¹⁰ In turn, Spanish Courts expect a ‘reasonable indication’ or ‘*prima facie* indication’¹¹¹ pointing to a *clear probability*¹¹² that discrimination was the underlying motive for the alleged behaviour.¹¹³ Whilst these statements suggest that a quite high degree of probability is required to shift the burden of proof to the respondent, neither of them clearly determines (1) *where lies the threshold* to conclude that the claimant has established a *prima facie* case of discrimination, and (2) which *type of evidence* is considered by courts in deciding whether to shift the *onus probandi*.

Regarding the first aspect, the high British litigation levels have yielded a much more complex and technical analysis of the burden of proof test. As a result, British tribunals have developed the ‘*Barton/Igen Guidance*’¹¹⁴, a detailed 13 points explanation on how burden of proof rules should be applied in discrimination claims. On this basis, at the first stage the British claimant should provide evidence of less favourable treatment from which the tribunal *could infer*

¹⁰⁸ See eg *Laing v Manchester City Council* 2006 ICR 1519 (EAT); SSTC 87/1998 de 21 abril; 17/2003 de 30 enero; 41/2006 de 13 febrero.

¹⁰⁹ Renton (n 100) 76.

¹¹⁰ *Igen Ltd v Wong and other cases* 2005 ICE 931(CA), Annex: *Barton/Igen Guidance*, points 1 and 2. This wording suggests that the employer needs to prove that there is some degree of certainty, and not just a possibility, see *Igen* [31]-[32] and Annex.

¹¹¹ The Spanish expressions are, respectively, *indicio razonable* and *principio de prueba*.

¹¹² *ibid*.

¹¹³ See eg SSTC 293/1993 de 18 octubre; 30/2002 de 11 febrero; 41/2006 (n 108). In addition, if the claim is based on several sets of facts, the claimant needs to show the causal nexus with the employer’s measures, STC 87/1998 de 21 abril FJ 4.

¹¹⁴ *Barton v Investec Henderson Crosthwaite Securities Ltd* 2003 ICR 1205 (EAT); *Igen* (n 110).

that the employer has committed an act of discrimination based on the protected ground.¹¹⁵ Notably, the *Barton/Iguen guidance* points that '[i]t is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of [...] discrimination' and that at the first stage of the test 'the tribunal *does not have to reach a definitive determination* that such facts would lead to the conclusion that there was an act of unlawful discrimination'.¹¹⁶ This seems to indicate that the claimant would need to give some signs of potential discrimination, but would not need to prove that she was actually discriminated at the first stage. These signs of discrimination must be established in relation to a comparator,¹¹⁷ who should be as similar as possible to the aggrieved employee.¹¹⁸

In contrast, Spanish Courts have not provided detailed indication as to the set of facts which should to be put forward by the claimant to shift the *onus probandi* to the respondent. Their assessment often entails a causation analysis which seeks to determine if there is a link between the protected ground and the unfavourable treatment,¹¹⁹ but rarely brings into the analysis the issue of the comparator: although they mention the comparison on a theoretical level, they do not really apply it to the facts. Even though the use of comparators in discrimination tests can have some drawbacks,¹²⁰ the fact that Spanish courts do not establish a clear comparison to consider whether there is prima facie case of discrimination, can also be a disadvantage for the claimant. That was the case in a judgment concerning a black person being racially discriminated in a promotion procedure for a job at the reception of the hotel where he was a gatekeeper. The claimant managed to prove that the reception manager and the accommodation director did not want him to work at the reception because he was black. In addition, he proved that the reception manager offered a position at the reception to other white employees who did not have any experience or training on the ground that 'they would learn by doing'. In contrast, the claimant spoke five

¹¹⁵ *Laing* (n 108); *ibid.*

¹¹⁶ *Barton/Iguen guidance*, points 3 and 5 (author's italics).

¹¹⁷ See in particular *Igen* (n 110) [34].

¹¹⁸ Hypothetical comparators and material differences are likely weaken the evidence; see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

¹¹⁹ The Spanish Constitutional Court expressly referred to this causation analysis in SSTC 17/2007 de 12 febrero; 41/2006 (n 108), of 13 February.

¹²⁰ McColgan, 'Cracking the comparator' (n 99).

languages and had passed a relevant training course. Instead of comparing the claimant to white employees with *equivalent* or *lower* qualifications to determine whether there was unfavourable treatment on grounds of race, the court assessed the facts altogether, including the explanations provided by the employer. So, whilst the use of a comparator in a first stage could have certainly led to the shift of the burden of proof to the employer, the general appraisal of the court directly ruled it out.¹²¹ In contrast, in the relatively similar British case, *Network Rail Infrastructure*, the EAT put special emphasis on the comparison of the black candidate with other white candidates *equally* or *less* qualified than the claimant.¹²² So in the above-mentioned Spanish case, where the black employee was unfavourably treated compared to *less* qualified white employees, British tribunals would probably have accepted to shift the *onus probandi* to the respondent. Thus, the Spanish 'all-in-one' approach makes it more difficult for claimants to shift the burden of proof to the respondent.

Hence, Spanish claimants have often had to produce stronger evidence of discrimination than British ones to establish a *prima facie* case of discrimination. This can be especially problematic in racial harassment cases, where hostility towards the employees is often very subtle. Due to these difficulties, Spanish trade unions representing victims of harassment often request the intervention of the Labour Inspectorate before initiating proceedings in an attempt to gather further evidence.¹²³ For instance, in a case where the claimant was harassed on racial and religious grounds by his employer, the trade union representing the claimant had difficulties proving harassment because the employer had put pressure on all other employees to declare in its favour during the hearing.¹²⁴ Nevertheless, a former employee declared that in 2010 he heard the manager talking to the claimant in derogatory terms, with quotes like: 'in this company there are too many Moors' or 'that Moor doesn't know anything'.¹²⁵ However, the court did not want to take that

¹²¹ STSJ (Canarias) 8 septiembre 2006 (RJ 2007/156).

¹²² *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 (EAT).

¹²³ Budría Laborda (n 33). See also F Navarro Nieto, 'Impulsos y resistencias judiciales en la tutela frente al acoso moral' [2010] Aranzadi Social 109; A Zapirain Bilbao, 'Acción de tutela que "repara" lesión por tratamiento discriminatorio con indemnización, excluyendo de ésta el acoso por no probado, tras previo proceso de extinción del contrato por voluntad del trabajador con base en discriminación por razón de sexo (maternidad).' [2011] Aranzadi Social 1.

¹²⁴ Budría Laborda, *ibid*.

¹²⁵ SJS (Zaragoza) 105/2013 (n 30).

evidence into account because it was produced by a former employee¹²⁶ and it took place before the main harassment incidents. In contrast, British tribunals have accepted as evidence indicators of racial bias 'from a time before or after the particular decision'.¹²⁷

However, the Court of Appeal ruling in *Madarassy* marked a turning point in British case law,¹²⁸ which has led tribunals to require a higher degree of probability at the first stage of the burden of proof test. Building on paragraphs 29-30 from *Igen*,¹²⁹ the Court established that a difference in status (ie ethnicity) and a difference in treatment are not sufficient to shift the burden of proof to the respondent. To achieve this, a link between the two is necessary, ie the claimant must prove that the less favourable treatment is *due to* his race.¹³⁰ Hence, in practice, the claimant is almost required to bring conclusive evidence that he was racially discriminated already at the first stage, which virtually neutralises the potential benefits of a two stage burden of proof test. In Renton's words, the claimant 'must persuade the Tribunal that its *entire* case is well-founded. That point being accepted, the employer still has the chance to refute the case (with the 51 per cent standard now applying to them)'.¹³¹ Hence, after *Madarassy*, the Spanish and the British threshold to shift the burden of proof to the respondent has arguably come closer: in both jurisdictions courts need to be persuaded that the claimant has been discriminated against from the outset. On the one hand, this interpretation protects the respondent from bearing the burden of proof when a

¹²⁶ At this respect, it is unconvincing that the court did not want to take into account evidence produced by a former employee (presumably because it could be biased against the employer) but it took into account evidence produced by current employees, which could also be biased against the claimant due to their subordination to the employer.

¹²⁷ *Anya v University of Oxford* [2001] IRLR 377 (CA). In *Chattopadhyay v The Headmaster of Holloway School* [1981] IRLR 487 (EAT) the EAT also ruled that: '[i]f a person involved in an alleged act of discrimination had, before the act complained of, treated the complainant with hostility, that evidence of hostility would be admissible as showing circumstances consistent with a racist attitude'.

¹²⁸ *Madarassy v Nomura International plc* [2007] EWCA Civ 33 (CA).

¹²⁹ (n 110). Note that these paragraphs seem to contradict points 3 and 5 of the *Barton/Igen* guidance, revised and approved in the same judgment (see text to n 116).

¹³⁰ *Madarassy* (n 128) [54]-[57]. See also *Commissioner of Police of the Metropolis v Grewal* [2011] UKEAT 0406/09 [31]-[36]; *Learning Trust v Marshall* [2012] EqLR 927 (EAT) [67].

¹³¹ Renton (n 109) 78-79. See also E Williams and E Coghlin, 'Proving and Disproving Discrimination' Michael Rubenstein Blog (7 August 2014)

<<http://blog.rubensteinpublishing.com/proving-and-disproving-discrimination-by-ed-williams-and-tom-coghlin/>> accessed 1 October 2014.

case is unfounded.¹³² On other hand, whilst the *Madarassy* doctrine is not problematic in cases of overt discrimination, where there is little doubt as to the discriminatory behaviour,¹³³ it enormously limits the chances of success of claimants who suffered covert or subtle discrimination.

Nevertheless, in line with the CJEU case law, both British tribunals and Spanish courts seem willing to establish presumptions that, *in very specific cases*, could alleviate the claimant's burden of persuasion at the first stage.¹³⁴ For instance, Spanish courts have recognised that the discretion derived from the employer's organisational and disciplinary power can hamper the employee's attempts to prove discrimination, which should be taken into account in assessing the facts at the first stage.¹³⁵ Similarly, in Britain, the EAT has recognised that even if several incidents cannot provide enough evidence of discrimination separately, their 'cumulative effect' should be considered to establish if there is a *prima facie* case of discrimination.¹³⁶ In addition, in both jurisdictions, the lack of transparency in recruitment or promotion procedures can more easily lead to the shift of the burden of proof to the respondent. British case law explicitly refers to an 'evasive or equivocal reply' to the statutory questionnaire procedure,¹³⁷ and Spanish Courts have ruled that a lack of transparency in internal policies together with relevant statistics is enough to shift the burden of proof to the employer in cases of indirect discrimination.¹³⁸

Regarding the type of evidence considered at the first stage, as the Spanish 'receptionist case' mentioned earlier illustrates,¹³⁹ Spanish courts tend to consider employers' explanations to determine if there is a *prima facie* case of

¹³² *Igen* (n 110) [33]. See also G Ormazabal Sánchez, *Discriminación y carga de la prueba en el proceso civil* (Marcial Pons 2011).

¹³³ It has been rightly pointed that in those cases the burden of proof provisions 'have nothing to offer' because 'the tribunal is in a position to make positive findings on the evidence one way or the other', *Hewage v Grampian Health Board* [2012] UKSC 37 [32]. See also *Network Rail Infrastructure* (n 122) [17]. Similarly, SJS (Zaragoza) 287/2008 de 11 Septiembre FJ 7.

¹³⁴ That can be the case if the employee is trying to compare his situation to a hypothetical comparator, see *Shamoon* (n 118). See also the Spanish case STC 41/2006 (n 108) FJ 4.

¹³⁵ See STSJ (Cataluña) 29 enero 2013 (AS 2013/241) FJ 5.

¹³⁶ *X v Y* [2013] UKEAT 0322/12 [60]-[61].

¹³⁷ *Barton/Iguen Guidance*, point 7. See also *Dresdner Kleinwort Wasserstein Ltd v Adebayo* [2005] IRLR 514 (EAT). However, the statutory questionnaire procedure has recently been repealed by the Enterprise and Regulatory Reform Act 2013, s 66.

¹³⁸ SJS (Zaragoza) 287/2008 (n 133).

¹³⁹ Text to n 121.

discrimination. Conversely, in Britain, the *Barton/Igen guidance* establishes that, at the first stage, ‘the tribunal must assume that there is no adequate explanation for those facts’.¹⁴⁰ Subsequent case law has interpreted the *Barton/Igen guidance* as not completely ruling out the consideration of the employer’s explanations at the first stage, provided they refer to the *facts*. In *Laing*, Elias J pointed that even if the burden of *persuasion* rests on the claimant at the first stage,¹⁴¹ ‘the tribunal is looking at the *primary facts before it*’,¹⁴² without limiting the burden of *production* only to the claimant.¹⁴³ Elias J thus concluded that *facts* adduced by the respondent should also be considered at the first stage, whilst *explanations* –reasons for the unfavourable treatment– should be left for the second stage.¹⁴⁴ Hence, Spanish claimants have to overcome more hurdles to establish a *prima facie* case of discrimination because courts tend to conduct an overall appraisal of both *facts* and respondents’s *explanations* already at the first stage.

5.4 Substantive reparation and sanctions

5.4.1 EU law: ‘effective, proportionate and dissuasive’ remedies

According to article 15 of the RED ‘Member States shall lay down the rules on *sanctions* applicable to infringements of the national provisions’ implementing the RED. It is considered that the term ‘sanction’ should be broadly interpreted as to include not only *sanctions* to punish the perpetrator, but also *remedies* seeking to repair the victim’s loss, be it economic or not. In fact, article 15 of the RED refers to the ‘payment of compensation to the victim’ as an example of ‘sanctions’, which confirms the broad meaning of the term.¹⁴⁵

The CJEU has recognised that MS have the freedom to choose which remedies are made available to victims of discrimination¹⁴⁶ provided they are

¹⁴⁰ *Barton/Igen Guidance* (n 110) point 6.

¹⁴¹ *Laing* (n 108) [59].

¹⁴² *Barton/Igen Guidance* (n 110) point 5.

¹⁴³ *Laing* (n 108) [58]-[62]; *Madarassy* (n 128) [69]; *Khan and anor v Home Office* (2008) EWCA Civ 578.

¹⁴⁴ *Laing* (n 108) [60].

¹⁴⁵ C Tobler, *Remedies and Sanctions in EC non-discrimination law* (OPEU 2005).8, 34; Ambrus (n 5) 273.

¹⁴⁶ *Firma Feryn* (n 11) para 37. See also Cases C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 24; 79/83 *Harz v Deutsche Tradax GmbH* [1984] ERC 1921, para 18; *Draehmpaehl* (n 161) para 24; Case C-177/88 *Dekker v VJV-Centrum* [1990] ECR I-03941, para 23.

‘effective, proportionate and dissuasive’.¹⁴⁷ Yet, it is not easy to infer from these terms the attributes that remedies should have. Although these terms sometimes overlap,¹⁴⁸ an analysis of the case law and scholarly literature suggests that ‘effective’ refers to the extent to which those remedies compel observance with the objectives of the RED;¹⁴⁹ ‘proportionate’ denotes that remedies must be ‘commensurate to the seriousness of [the] breach’;¹⁵⁰ and ‘dissuasive’ implies deterrence, that is, sanctions should discourage disobedience and recidivism.¹⁵¹

The extent to which national remedies comply with these requirements should be assessed in the context of each specific case.¹⁵² Nevertheless, from the CJEU case law it is possible to draw some general principles that national remedies should observe. Already in *Von Colson*, the court made clear that purely symbolic sanctions, such as nominal damages or the reimbursement of the travel costs to attend a job interview,¹⁵³ do not comply with the requirement of dissuasiveness.¹⁵⁴ However, the CJEU has also ruled that a declaration recognising the existence of discrimination may be acceptable as a sanction provided it is given ‘an adequate level of publicity, the cost of which is to be borne by the defendant’.¹⁵⁵

Furthermore, the CJEU has found that in discriminatory dismissal cases, national remedies can only consist of either ‘reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained’.¹⁵⁶ However, EU law does not compel the employer to engage a candidate who was discriminated against in a recruitment procedure.¹⁵⁷

¹⁴⁷ Art 15 RED. See also *Von Colson*, *ibid* para 23; Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 17; C-271/91 *Marshall v Southampton and South-West Hampshire AHA* [1993] ECR I-04367, paras 23-26.

¹⁴⁸ B Cohen, ‘Remedies and Sanctions for Discrimination in Workin Life under the EC Anti-Discrimination Directives’ in J Cormack (ed), *Discrimination in Working Life. Remedies and Enforcement* (MPG 2004) 16, 18.

¹⁴⁹ Tobler (n 145) 10.

¹⁵⁰ *ibid*. See also C-185/97 *Coote v Granada Hospitality Ltd* [1998] ECR I-05199, paras 18-24; S Moore, ‘Compensation for Discrimination’ (1993) 18 *ELRev* 533, 538.

¹⁵¹ *Dekker* (n 146) para 23; *Asociația* (n 11) para 67. See also Prechal (n 150) 9-10.

¹⁵² *Marshall* (n 146) paras 24-25. See also Tobler (n 145) 10.

¹⁵³ *Von Colson* (n 146) para 26.

¹⁵⁴ See also AG Maduro in *Firma Feryn* (n 11), para 28.

¹⁵⁵ *Firma Feryn* (n 2) para 39.

¹⁵⁶ *Marshall* (n 146) para 25.

¹⁵⁷ *Von Colson* (n 146) para 28. However, in *Von Colson* (n 146) para 18 and *Harz* (n 146) para 18, the ECJ gave this option as an example of possible remedy.

Accordingly, restitutionary remedies are not strictly required by EU law, provided that an adequate financial compensation is awarded instead.

The CJEU has provided more detailed guidance concerning compensatory remedies. *Marshall* made clear that, under EU law, victims need ‘to be made good in full’, so ‘just compensation’ is not enough.¹⁵⁸ Consequently, the amount of compensation cannot be limited *a priori* to a maximum level because it could hamper adequate compensation depending on the circumstances of the case.¹⁵⁹ Nevertheless, upper compensation limits can be acceptable when an applicant, who claims discrimination in a recruitment procedure, has lower qualifications than the appointed candidate. In that event, the CJEU considers that the applicant has not ‘suffered any damage through exclusion from the recruitment procedure’ so an upper limit to compensation is acceptable.¹⁶⁰

Whilst the CJEU has not explicitly recognised the need to award non-material damages to compensate *inter alia* injury to feelings, it has done so in the context of consumer law.¹⁶¹ Considering that victims of discrimination must be compensated ‘in full’, it can be deduced that non-material damages should be available for non-economic loss derived from discrimination incidents.

Punitive remedies, like exemplary damages, fines and penal sanctions, also fall within the range of sanctions that MS can adopt to implement article 15 of the RED. Some scholars have pleaded for a more extensive use of exemplary damages in anti-discrimination law arguing that ‘real deterrence needs to be “painful”’.¹⁶² However, punitive remedies should not only be dissuasive, but also proportionate.¹⁶³ This is probably why the CJEU considers that fines should be ‘merely complementary’¹⁶⁴ to other remedies. Accordingly, compensation ‘can be

¹⁵⁸ *Marshall* (n 146). See criticism in N Reich, ‘Effective Private Law Remedies in Discrimination Cases’ in R Schulze (ed), *Non-Discrimination in European Private Law* (Mohr Siebeck 2011) 57, 62.

¹⁵⁹ *Marshall* (ibid) para 30.

¹⁶⁰ However, it is for the employer to prove that he was not engaged for that reason, *Draehmpaehl* (n 105) paras 33-36. Cf Reich (n 158) 67-68, 71.

¹⁶¹ Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG* [2002] ECR I-02631.

¹⁶² K L Alenfelder, ‘Damages in discrimination cases’ (2012) 13 ERA Forum 257, 273. See also Cohen (n 148) 20.

¹⁶³ O’Dempsey, cited by Tobler (n 145) 10.

¹⁶⁴ Tobler (n 145) 11.

backed up *where necessary* by a system of fines',¹⁶⁵ but it is only when the breach is serious that it will be proportionate to impose such fines.

5.4.2 British and Spanish remedies: encouraging or deterring litigation?

From the outset, the British and Spanish statutory approach to remedies is different. In Spain, courts hearing discrimination claims through the fundamental rights procedure *must* give a four-fold judgment, which is both declaratory and condemnatory.¹⁶⁶ They must (1) declare the existence of a breach of the right to equal treatment, (2) declare discrimination null and void, (3) order the cessation of discrimination, (4) order the reinstatement and compensation of the claimant, and award damages if appropriate.¹⁶⁷ In contrast, British tribunals *can*—but are not obliged to: (1) make a declaration stating the rights of the complainant and the respondent, (2) award compensation for the damage caused by discrimination and (3) make a recommendation.¹⁶⁸ Hence, whilst in Spain courts are bound to order the reinstatement of the claimant, British tribunals have the discretion to award declaration, compensation or making a recommendation.¹⁶⁹ For instance, in a British case where a deaf employee was suddenly made redundant, the Employment Appeal Tribunal ('EAT') found that he was put at disadvantage because he was evaluated according to the same criteria as other employees. However, he would probably have been made redundant anyway, so the tribunal found that making only a declaration was the most appropriate remedy because there was not an effective financial loss.¹⁷⁰ Whilst this seemed acceptable in this case, and may also be suitable when the claimant is only seeking justice, in other circumstances making only a declaration or a recommendation may fall short of compensating the claimant.

¹⁶⁵ *Von Colson* (n 146) para 18. See also *Firma Feryn* (n 2) para 39.

¹⁶⁶ STS de 14 julio 1993 (RJ 1993/5678). See also C Tolosa Tribiño, 'La Nueva Regulación del Proceso de Tutela en la Jurisdicción Laboral' (2012) 12 *Revista de Derecho del Trabajo y de la Seguridad Social* 29.47.

¹⁶⁷ Art 182(1) LJS.

¹⁶⁸ EqA 2010, s 124(2).

¹⁶⁹ The tribunal has a 'just and equitable' discretion to award a remedy; A Korn and M Sethi, *Employment Tribunal Remedies* (4th edn, OUP, 2011) 287.

¹⁷⁰ *Berry v GB Electronics Ltd* [2001] UKEAT 0882/00.

Reinstatement and recommendations

Unlike Spanish courts, which *must* order the employer to end discrimination and reinstate the employee, British tribunals do not have true powers to restore the victim to the prior situation. Tribunals can only award reinstatement in unfair dismissal proceedings, and not in discrimination proceedings. But even if the case is followed under the unfair dismissal procedure, the power to reinstate is rarely used in practice.¹⁷¹ In 2011/12, only in 0.1 % of successful unfair dismissal claims were reinstatement orders issued,¹⁷² which shows limited practical relevance of reinstatement. This is certainly one of the main drawbacks of the British formal enforcement system, because although some discrimination victims may not be willing to go back to their former employment, many others would prefer going back to work with their former colleagues and to have a job they liked, instead of receiving financial compensation but having the burden to find a new job or even starting a completely new career.¹⁷³ Furthermore, when a re-employment order is not implemented in Britain, the employer can try to justify that it was not 'practicable', and only if he fails will the tribunal be able to award (or increase) compensation. In contrast, in Spain, the claimant can apply for an enforcement order,¹⁷⁴ and the employer must continue to pay the salary and the taxes and social security contributions of the employee until he is re-engaged.¹⁷⁵

Instead of having the power to reinstate the claimant to the previous situation, in discrimination proceedings British tribunals have the power to make recommendations.¹⁷⁶ However, the use of recommendations to reinstate the victim can be controversial and has not always been accepted.¹⁷⁷ For instance, a

¹⁷¹ Renton (n 100) 16-17; G S Morris, 'The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms' in L Dickens (ed), *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Hart 2012) 19.

¹⁷² Ministry of Justice, 'Employment Tribunals and EAT Statistics 2011-12'

<<https://www.gov.uk/government/statistics/employment-tribunal-and-employment-appeal-tribunal-statistics-gb>> accessed 15 January 2014, Table 3. About the reasons see B Weekes 'Re-employment of Unfairly Dismissed Workers: The Lost Remedy' (1981) 10 ILJ 160-175.

¹⁷³ Renton (n 100) 16-18.

¹⁷⁴ Art 282(b) LJS.

¹⁷⁵ Art 284(a)-(b) LJS.

¹⁷⁶ EqA 2010, s 124(2).

¹⁷⁷ For instance, it has been held that in recruitment procedures governed by statutory rules, tribunals cannot recommend to appoint the claimant and that tribunals cannot recommend the automatic promotion of a victim without consideration of merit because that would amount to

recommendation to re-engage the claimant, who had been discriminated for racial reasons, was struck down in *Leeds Rhinos Rugby Club*. The EAT argued that re-engagement would not obviate or reduce the adverse effect of discrimination on the claimant, a rugby player, because the fact that he was re-engaged did not mean that he would effectively play with the team.¹⁷⁸ Nevertheless, in a recent discrimination by association case on the ground of disability, the employment tribunal recommended that the victim was offered a position in the 'previous terms and conditions'.¹⁷⁹

Nonetheless, recommendations have the limitation that they are very difficult to enforce. In case of non-compliance, the employer can still provide a 'reasonable excuse', and the tribunal can only react by awarding (or increasing) compensation,¹⁸⁰ which remains a relatively 'mild' sanction.¹⁸¹ For instance, in *Alam* the tribunal increased the award for injury to feelings by £2,500, plus £661 interest, because the respondent was four months late in complying with the recommendation.¹⁸² The tribunal argued that the award of injury to feelings could not be increased further because the respondent had eventually complied with the recommendation, which had also a compensatory aim.¹⁸³ Hence, recommendations are a 'timid weapon' compared to county court injunctions - which can lead to a fine or to imprisonment if the respondent fails to comply- and thus, cannot be considered an effective substitute for reinstatement.¹⁸⁴

General recommendations

Currently, British tribunals can make recommendations affecting not only the claimant ('individual recommendation') but also any other person ('general

positive discrimination. See respectively *North West Thames Regional Health Authority v Noone (No 2)* [1998] IRLR 530 (CA); *British Gas plc Sharma* [1991] IRLR 101 (EAT).

¹⁷⁸ *Leeds Rhinos Rugby Club v Sterling* [2002] UKEAT 267/01.

¹⁷⁹ *Bainbridge v Atlas Ward Structure Ltd* (ET, Case No 800212/2012, 30 May 2012) [17]. The duty to make reasonable adjustments can be a reason to treat race and disability cases differently, but this was not considered by the ET, which took account of the fact the company did not oppose such recommendation.

¹⁸⁰ EqA 2010, s 124(7).

¹⁸¹ S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 200.

¹⁸² *Alam v The Police Federation of England and Wales* (ET, Cases No 2504307/2005 & 2501503/2012, 9 April 2013).

¹⁸³ *Alam*, *ibid*, para 169.

¹⁸⁴ Fredman (n 181) 290. See also B Hepple, 'Agency Enforcement of Workplace Equality' in L Dickens (ed), *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Hart 2012) 62; Morris (n 171) 19.

recommendation’).¹⁸⁵ General recommendations were a welcome innovation of the EqA 2010, which can help address ‘systemic failures’ within organisations and improve ex-ante effectiveness because individual claims are often particular cases of systemic problems.¹⁸⁶ Reports show that ETs have been quite active in using this tool: in less than three years after the adoption of the EqA 2010, there had been 28 recommendations with general implications.¹⁸⁷ However, the *Deregulation Bill* 2013 is likely to repeal the power to make general recommendations.¹⁸⁸ Thus, if the claimant has left the organisation, as it often happens,¹⁸⁹ the tribunal will not be able to make any recommendation (unless it recommends reinstatement). For instance, in *Savage* the claimant was re-engaged after giving up his job because his boss had racially insulted him.¹⁹⁰ The tribunal recommended maintaining him in employment and paying him his due salaries. Under the current legislation, even if the claimant had not been re-engaged, the tribunal could have made a wider recommendation, ie providing training on equal opportunities to employees to avoid future racial insults, but such recommendation will not be possible once the Deregulation Bill is passed.

It should be noted that although Spanish courts do not have the power to make general recommendations, the Spanish Labour Inspectorate plays in a way the role of ensuring that employers’ policies are not discriminatory. Inspectors can take action on their own initiative or following a complaint, and they can request employers to modify their policies, take precautionary measures and impose fines.¹⁹¹ Given that Britain lacks a Labour Inspectorate, tribunals’ power to make

¹⁸⁵ However, ETs cannot award (or increase) compensation due to non-compliance for general recommendations, only for recommendations concerning the claimant see EqA 2010, EN, para 414.

¹⁸⁶ In that respect, Allen argues that they can have a regulatory function (n 74). However, Cohen notes that they may be even more difficult to enforce than individual recommendations because ‘if the claimant is gone, there is nobody monitoring to see whether the recommendation is being followed’, unless a trade union within the organization is aware of the recommendation; Interview with Barbara Cohen, independent equality consultant (London, UK, 6 December 2012).

¹⁸⁷ S Johnstone, ‘Recommendations’ [2013] Equal Opportunities Review 239.

¹⁸⁸ Deregulation HL Bill (2014-15) 58, s 2.

¹⁸⁹ Around 70% per cent of employees who suffer discrimination tend to leave the organisation, Lord Privy Seal, *The Equality Bill – Government response to the Consultation* (July 2008), para 6.2 <www.official-documents.gov.uk/document/cm74/7454/7454.pdf> accessed 25 September 2013.

¹⁹⁰ *Savage v Liverpool City Council* (ET Case No 35225/86).

¹⁹¹ Ley 42/1997, de 14 de noviembre, ordenadora de la Inspección de Trabajo y Seguridad Social, see in particular arts 3-8.

general recommendations can be used as a tool to partially fill that gap, so it would be unfortunate if this power disappears.

Financial compensation

Despite the above mentioned remedies, financial compensation is the most widely used remedy in Britain and Spain. In both legal systems, it has mainly a compensatory nature and there are different heads of damages which can be awarded to compensate the victim. However, damages awarded in Britain tend to be much more nuanced than those awarded in Spain. British tribunals normally differentiate between financial losses, injury to feelings, personal injury, aggravated damages and exemplary damages.¹⁹² In contrast, Spanish courts tend to differentiate only between two heads of damages: (1) damages for past loss of earnings and (2) all the other elements deserving compensation (see Table 1), which is more likely to lead to inconsistent awards because damages are not quantified separately.¹⁹³ Occasionally, however, British tribunals also make all-in-one awards, when it is very difficult to differentiate between different heads of damages, particularly between injury to feelings and personal injury due to psychiatric harm.¹⁹⁴

Table 1. Heads of damages in Britain and Spain.

Purpose	Britain	Spain
Compensatory	Financial loss: <ul style="list-style-type: none"> – Loss of past and future earnings – Pension loss – Job seeking/training expenses 	Loss of past earnings
	Injury to feelings	Any other elements deserving compensation: <ul style="list-style-type: none"> – Injury to feelings (<i>daños morales</i>) – Loss of future earnings – Loss of career prospects
	Personal injury	

¹⁹² Korn and Sethi (n 169) 290-322.

¹⁹³ See eg STSJ (Castilla La Mancha) 26 junio 2002 (AS 2003/669); SJS (Huelva) 388/2006 de 20 Noviembre; STS 20 September 2007 (RJ 2007/8304).

¹⁹⁴ See eg *Boamah v Tradetteam Ltd* (ET, Case No 3302524/11, 11 October 2012). In fact, the EAT has warned about the risk of overlap between injury to feelings and personal injury awards, see eg *HM Prison Service v Salmon* [2001] IRLR 425 (EAT); *Davies v Department for Work and Pensions* (ET, Case No 2100847/11, 31 July 2012).

Compensatory; (Punitive) ¹⁹⁵	Aggravated damages	---
Punitive	(Exemplary damages) ¹⁹⁶	(Administrative fines) ¹⁹⁷

Source: Own elaboration.

Another significant difference between the Spanish and the British system is the way in which loss of past earnings is established. In Spain awards are objectively determined by law, so they cannot be questioned in court.¹⁹⁸ In case of discriminatory dismissal or termination of contract at the request of the victim, the employer must pay the claimant, respectively, lost wages until the date of reinstatement (*salarios de tramitación*)¹⁹⁹ or a severance of 33 days' pay per year worked.²⁰⁰ On the contrary, in Britain awards are decided by the tribunal considering all 'the expenses that have, in fact, been reasonably incurred up to the date of the remedies hearing'.²⁰¹ The British approach has the advantage of allowing the inclusion of elements other than unpaid wages, such as pension loss,²⁰² the loss of a contractual bonus²⁰³ or tax liabilities.²⁰⁴ On the other hand, however, the parties bear more uncertainty than in the Spanish system because the award depends not only on arithmetical calculations, but also on additional considerations, ie whether the claimant tried to mitigate the loss (eg by actively looking for another employment).²⁰⁵

As regards injury to feelings, harm needs to be proved by the claimant in both jurisdictions: it is not presumed that unlawful discrimination entails moral injury.

¹⁹⁵ See a discussion in Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Sixth Programme of Law Reform: Damages 1997) paras 1.7-1.9.

¹⁹⁶ Currently they can only be awarded in exceptional cases (see *Rookes v Barnard* [1964] AC 1129, per Lord Devlin), but the Law Commission proposed to extend them, inter alia, to very serious discrimination cases, see *ibid*, paras 1.15; 1.19-1.24.

¹⁹⁷ See A Aguilera Rull, 'El Proyecto de Ley integral para la igualdad de trato y la no discriminación' [2011] InDret 423.

¹⁹⁸ STS de 12 abril 1993 (RJ 1993/2922).

¹⁹⁹ Art 55(6) ETT.

²⁰⁰ Arts 50(2), 56(1) ET. See also J González Velasco, 'Proceso de Despido' <www.iustel.com> accessed 15 September 2013.

²⁰¹ Korn and Sethi (n 169) 300.

²⁰² *Davies* (n 194).

²⁰³ *Porter v Phaze Electrical Ltd* (ET, Case No 1400588/11, 7 February 2012).

²⁰⁴ *McCammon v Gillingham Football Club* [2012] EqLR 899.

²⁰⁵ *ibid*, *Yellow v Vision Security Group* (ET, Case Nos 1201973/09 and 1201974/09, 31 January 2012). Mitigation is a common law principle which applies to all heads of loss, Korn and Sethi (n 169) 311. The burden of proof of failure to mitigate loss lies on the person who claims it, see *Ministry of Defence v Hunt* [1996] IRLR 139 (EAT).

However, it is easier to prove in Britain because it is considered that ‘an injury to feelings claim is so fundamental to a [...] discrimination case that it is almost inevitable’.²⁰⁶ For instance, in a case where the victim was simply frustrated by the discriminatory act, the Court of Appeal considered that the tribunal was wrong in not making an injury to feelings award.²⁰⁷ Conversely, in Spain the normal emotional distress caused by a discriminatory dismissal is not enough to award injury feelings: it is necessary to prove additional harm.²⁰⁸ Furthermore, whilst in Britain it is sufficient that the claimant raises the issue of hurt feelings for the tribunal to take it into consideration and quantify it,²⁰⁹ Spanish Courts often require the claimant to bring some evidence for its quantification.²¹⁰ Still, the Spanish Constitutional Court has noted that in some cases proving psychological abuse will be enough.²¹¹

The approach for calculation of injury to feelings awards is also different in Britain and in Spain. In Britain *HM Prison Service v Johnson* provided a set of principles to guide the calculation of compensation for non-financial loss. This guidance explicitly states, inter alia, that awards ‘should compensate fully without punishing the tortfeasor’ and ‘feelings of indignation at the tortfeasor’s conduct should not be allowed to inflate the award’, that ‘awards should bear some broad general similarity to the range of awards in personal injury cases’ and that ‘tribunals should remind themselves of the value in everyday life of the sum they have in mind’.²¹² These principles have been supplemented by the *Vento (No 2)*²¹³ classification of awards in three broad bands (‘less serious’, ‘serious’ and ‘most serious’), which depending on the seriousness of the case go from a minimum of

²⁰⁶ Korn and Sethi (n 169) 291. See also *Ministry of Defence v Cannock* [1994] ICR 918.

²⁰⁷ *Assoukou v Select Services Partners Ltd* [2006] EWCA Civ 1442 (CA).

²⁰⁸ SSTs de 20 enero 1997 (RJ 1997/620); 28 febrero 2000 (RJ 2000/2242); 17 enero 2003 (RJ 2994/1478); 20 septiembre 2007 (RJ 2007/8304); STSJ (Andalucía) 12 julio 2012 (AS 2012/2456). This case law has been labelled as “irreproachable”, STC 247/2006 de 24 julio.

²⁰⁹ *Murray v Powertech (Scotland) Ltd* [1992] IRLR 257 (EAT).

²¹⁰ STSJ (Andalucía) 12 julio 2012 (n 208), and other judgments cited therein.

²¹¹ STC 247/2006 (n 208) FJ 7-8.

²¹² [1997] ICR 275, 283 B-D.

²¹³ *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] ICR 318 (CA), as updated to take account of the inflation by *Da’Bell v National Society for the Prevention of Cruelty to Children* [2010] IRLR 19 (EAT). *Vento (No 2)* also suggested taking account of the Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (last edition: 12th edn, OUP 2013).

£500 to a maximum of £30,000.²¹⁴ Although tribunals do not follow the *Vento bands* strictly, they have provided further criteria to classify cases according to these three categories. For instance, cases are often qualified as ‘serious’ when discrimination lasted for a long time,²¹⁵ when the respondent is a public employer,²¹⁶ when he failed to protect the victim,²¹⁷ or when he put pressure on the victim.²¹⁸ Also, isolated acts of discrimination tend to be considered ‘less serious’, but when the incident causes ‘serious consequences’ tribunals are prone to categorise them as ‘serious’.²¹⁹

In contrast, although Spanish law states that awards should be ‘reasonably’ determined, so as to redress the victim adequately and be dissuasive,²²⁰ Spanish quantification criteria are less clear and more inconsistent than those applied by British Tribunals. Spanish courts tend to take into account prior awards,²²¹ the nature of the injury, its seriousness and the duration of the breach.²²² However, they have the discretion to establish the amount of injury to feelings awards²²³ and they may take –at least– two different approaches to quantification. The first approach takes guidance from the *compensation scale for road accidents*.²²⁴ Social courts are not bound by this scale, but its use as an indicative criterion is largely accepted.²²⁵ The scale provides several coefficients which are multiplied by the

²¹⁴ Note, however, that following the CJEU ruling in *Marshall* (n 146), Britain and Spain do not apply upper limits for compensation anymore, see STS de 20 Septiembre 2007 (RJ 2007/8304) FJ 3; A V Sempere Navarro and C San Martín Mazzucconi, *La Indemnización por Daños y Perjuicios en el Contrato de Trabajo* (Aranzadi 2003) 93. Lower limits do not apply either, but in Britain the CA has made clear that injury to feelings awards under £500 should be avoided, whilst in Spain there have been injury to feelings awards of €1 (SAP (Madrid) 211/ 2009 de 6 mayo), which has been criticized for sending a signal that discrimination is not serious breach, see Aguilera Rull (n 197) 422.

²¹⁵ *Alam v Choudhary t/a The Rajput Restaurant* [2012] EqLR 725 (ET).

²¹⁶ *Davies* (n 202).

²¹⁷ *ibid.*

²¹⁸ *Vernon v London Borough of Hammersmith and Fulham* [2012] EqLR 527 (ET).

²¹⁹ *Yellowe v Vision Security Group* (ET, Case Nos 1201973/09 and 1201974/09, 31 enero 2012); *McCammon v Gillingham Football Club* [2012] EqLR 899 (EAT).

²²⁰ Art 183(2) LJS.

²²¹ A V Sempere Navarro and J A Buendía Jiménez, ‘El carácter tasado de la indemnización por resolución del contrato de trabajo’ [2004] Repertorio de Jurisprudencia Aranzadi 13.

²²² Navarro Nieto (n 123) 141.

²²³ See STS de 22 mayo 1995 (RJ 1995, 4088); Sempere Navarro and San Martín Mazzucconi (n 214) 175.

²²⁴ RD Legislativo 8/2004, de 29 de octubre, por el que se aprueba el texto refundido de la Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor.

²²⁵ See eg SSTS de 2 febrero 1998 (RJ 1998/1438); 17 febrero 1999 (RJ 1999/2598). The road accidents scale is used to calculate awards which compensate for all damages (including injury to feelings), except for past financial loss.

number of days of sick leave,²²⁶ but in some cases the statutory coefficient has been replaced by a coefficient based on the salary of the claimant.²²⁷ This illustrates the inconsistencies which arise from Spanish case law and the dangers of quantifying moral damages by using *only* economic criteria. Even if two different victims spent the same time on sick leave, the harm to feelings might have been much higher for one of them than for the other. Furthermore, making the coefficient dependent on the salary seems even more inappropriate because the moral harm suffered by the victim has nothing to do with the latter's level of earnings.

The second approach relies on the *scale of administrative fines against the employer* ('LISOS scale').²²⁸ However, this is problematic for two reasons. Firstly, the scale is designed for administrative proceedings followed against the employer,²²⁹ so unlike the *Vento* bands, it has *punitive* –and not *compensatory*– purposes.²³⁰ Secondly, the lower band for harassment and discrimination wrongs starts already with high minimum and maximum values (6,251 to 25,000 euros),²³¹ so, considering that many awards are below 6,251 euros, this scale has limited practical relevance. In fact, it is possible to find similar cases where courts have applied these bands and have awarded different compensation amounts. For instance, in two cases concerning the discriminatory dismissal of women linked to reproductive rights, the Upper Tribunal of Madrid made awards for injury to feelings of €1000 and €4000, respectively, taking into account the LISOS scale.²³²

5.5 Conclusion

The purpose of this chapter was assessing which factors and actors influence the effective application of racial equality legislation as regards formal enforcement. The comparative study has demonstrated that British and Spanish enforcement mechanisms have features which both stimulate and hinder the

²²⁶ See eg STSJ (Madrid) 21 julio 2008 (AS 2008/2475). Coefficients have been updated each year.

²²⁷ *ibid.*

²²⁸ RD Legislativo 5/2000, de 4 de agosto, por el que se aprueba el Texto Refundido de la Ley sobre Infracciones y Sanciones en el Orden Social ('LISOS').

²²⁹ Art 8(12) LISOS.

²³⁰ See Aguilera Rull (n 197) 418-423.

²³¹ Art 40(1) LISOS.

²³² Compare cases SSTSJ (Madrid) 8 octubre 2008 (AS 2009/276) and 21 octubre 2006 (JUR 2007/324044); for comments on this and other inconsistencies in injury to feelings awards see Aguilera Rull (n 197) 418-423.

effectiveness of racial equality legislation. In this regard, at the individual level, British victims can be represented by a broader range of organisations, but at the collective level, Spanish rules are more effective to reduce retaliation and to take action in cases of ‘victimless discrimination’. In turn, although the threshold to shift the burden of proof to the respondent is high in both jurisdictions, Spanish courts have developed a less consistent test than British tribunals, which may deter victims from initiating judicial procedures. Finally, remedies have shortcomings in both jurisdictions: British tribunals are more predictable than Spanish courts in fixing the amounts of injury to feelings’ awards, but they are less likely to award reinstatement and the recent introduction of tribunal fees limits the potential of financial compensation as a means to offset victims’ moral and judicial costs.

Hence, overall, this chapter has shown that British and Spanish rules on standing, the burden of proof and remedies do have an influence on *ex-post effectiveness*, and in some cases, they may also have an incidental impact on *ex-ante effectiveness*.²³³ In the field of legal standing, ensuring that victims can be represented by different types of persons, ie not only lawyers, but also equality bodies, trade unions and NGOs, facilitates access to representation for different types of victims and allows them to choose the most suitable representative according to their circumstances. For instance, trade unions and NGOs may both be appropriate representatives for individuals with limited resources, but a Roma NGO could be preferred over a trade union to represent a Roma victim. Furthermore, third parties’ intervention can be a useful tool to compensate the power imbalance between the parties and help courts better understand the technicalities of anti-discrimination law. In particular, allowing courts to request the intervention of expert institutions, like equality bodies, could be especially useful in some jurisdictions, like in Spain, where courts have less equality law expertise. On a collective level, joint claims are also a valuable tool because they enable victims to face discrimination disputes as a group, so they can share costs, reinforce the evidence and support each other. But what can really make a difference in terms of addressing institutional discrimination and improving both *ex-ante* and *ex-post* effectiveness is allowing representative actions along the lines

²³³ On these concepts see s 2.4.2.

of *actio popularis*. As the Spanish ‘collective conflict’ procedure, this type of action can be used to challenge ex-ante discriminatory advertisements and policies, which could otherwise never be brought to court.

Nonetheless, no matter how broad standing rules are, victims will always have to face the conundrum of proving discrimination. According to the British and Spanish experience, the shift of the burden of proof has a limited practical relevance because courts must strike a difficult balance between lessening the victim’s burden and avoiding placing unfounded burdens on the respondent. For this reason, courts tend to require almost conclusive evidence of discrimination as early as the first stage, which is often very difficult –if not impossible– for victims to produce. The shortcomings of the burden of proof test also derive from its artificial separation in two stages, which –although theoretically beneficial for the victim– does not match the practice, because all evidence is produced at the same time.²³⁴ This may lead judges to make up their mind in one go, and not in two stages. Furthermore, judges are people themselves, who belong to Semi-Autonomous Social Fields (‘SASFs’), ie communities with their own assumptions and values, which may influence their perception of written evidence and oral testimonies.²³⁵

Eventually, even if victims manage to persuade courts that they were discriminated against, they do not know if they will be reinstated or properly compensated. Arguably, compensation is less effective than reinstatement because once victims leave the organisation, even if they are compensated, they have already lost a job that they liked, contact with co-workers that they might have known for years, social recognition, etc.²³⁶ On the other hand, if the working environment was very hostile, the victims themselves might prefer compensation instead. However, quantifying the harm suffered by victims is a difficult task, because it not only concerns material damage, but also emotional harm. As the

²³⁴ Madarassy (n 128) 70].

²³⁵ Mason argues that ‘a judge, like any other individual, possesses membership of a cultural group, and as such also possesses the assumptions and values that characterize that normative system’, see L Mason, ‘The Hollow Legal Shell of European Race Discrimination Policy: The EC Race Directive’ (2010) 53 *American Behavioral Scientist* 1731, 1740. In the same line, Renton argues that in racial discrimination cases judges are ‘over-conditioned to disbelief’ witnesses (n 109) 83-85.

²³⁶ Renton (n 100) 17.

comparative analysis suggests, this may lead to uncertainty and inconsistencies, which may ultimately deter some victims from initiating judicial proceedings at all –especially, if litigation costs are high.

Given that the difficulties to prove discrimination and to provide adequate reparation to victims are inherent to formal enforcement procedures based on adjudication, non-adjudicatory enforcement systems may be more suitable to solve discrimination disputes effectively. For instance, Alternative Dispute Resolution ('ADR') mechanisms may have the advantage of giving *the parties* the autonomy to decide the outcome of the dispute. For this reason, Chapter 6 analyses the potential of ADR mechanisms for achieving higher levels of ex-post effectiveness, and the role that filters (ie equality bodies, trade unions and NGOs) can play in tackling discrimination at early stages and guiding victims to take the most effective course of action.

Chapter 6. The role of filters and alternative dispute resolution mechanisms

6.1 Introduction

Chapter 5 suggested that some aspects of formal enforcement mechanisms, like legal standing limitations, victims' difficulties to shift the burden of proof and incoherence in remedies' awards, can limit the ex-post effectiveness of racial equality legislation. This chapter analyses how actors other than courts, and non-adjudicatory procedures, can contribute to increase the effectiveness of racial equality law. Firstly, the chapter focuses on how filters can empower victims to report discrimination and point them towards the most appropriate course of action, thus reducing social and institutional lumping.¹ Second, it discusses whether Alternative Dispute Resolution ('ADR') mechanisms can enhance ex-post effectiveness by reducing confrontation and by allowing parties to find their *own* solution to the dispute.

By 'filters' I refer to any individual or organisation which helps victims identify a discriminatory incident and can advise them on which strategy to follow. This chapter focuses on three particular types of filters: equality bodies, NGOs and trade unions. It will be argued that these filters are complementary: interaction and networking between them can increase their effectiveness as advice providers –particularly between NGOs and equality bodies, for this reason, these two types of filters will be analysed together.

There are different types of ADR mechanisms available for racial discrimination disputes, ranging from simple negotiation between the parties to systems which require the intervention of a neutral third party (ie conciliation, mediation or arbitration). This chapter mainly concerns 'institutional systems' of

¹ In other words, reducing victims' inaction and overcoming systemic barriers to access justice.

ADR.² In particular, the analysis focuses on procedures where the ‘third party’³ belongs to the Advisory, Conciliation and Arbitration Service (‘Acas’) (Britain), to administrative or publicly funded bodies (Spain), or to Employment Tribunals or Courts (both countries).⁴ However, the emphasis will be on conciliation mechanisms because they are the most widely used procedures in Britain and Spain.

The Chapter starts with the analysis of the role played by filters (6.2). After recalling EU and international standards (6.2.1), it examines the functions of filters in Britain and Spain (6.2.2). The chapter then explores the role played by equality bodies, paying special attention to their interaction with NGOs (6.2.2.1), and the role played by trade unions in both countries (6.2.2.2). Whilst the section on equality bodies and NGOS analyses their role in tackling both *individual* and *collective* discrimination, the section on trade unions focuses only on *individual* discrimination.⁵

The second part of the Chapter focuses on the analysis of ADR mechanisms (6.3). It starts by considering their potential for increasing the effectiveness of the RED (6.3.1) and the extent to which EU standards match the special features of discrimination disputes (6.3.2). On this basis, it then analyses British and Spanish ADR mechanisms (6.3.3.1) and the extent to which these systems can contribute to increasing the effectiveness of the RED (6.3.3.2).

6.2 *The role of filters*

Filters can play a key role in addressing discrimination at an early stage, in empowering victims to take action, in pointing them towards the most appropriate enforcement mechanism and even in tackling discrimination at a collective level. This section seeks to analyse the role that both institutional (ie

² That is, mechanisms which are publicly promoted through statutory regulation or other formal means, see J Brock and G W Cormick, ‘Can Negotiation Be Institutionalized or Mandated? Lessons from Public Policy and Regulatory Conflicts’ in K Kressel and others (eds), *Mediation Research. The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass 1989) 138, 139.

³ I use this term to refer to any third party intervening in ADR procedures, be those conciliators or mediators.

⁴ Arbitration is excluded from the analysis because, in Britain, Acas arbitration is not available for discrimination disputes, and in Spain, it is rarely used in practice.

⁵ Trade unions’ role in addressing collective discrimination will be dealt with in s 7.3.2.

equality bodies) and non-institutional filters (ie trade unions and NGOs) can play in effectively addressing discrimination.

6.2.1 EU law and international standards

According to article 13(2) of the RED, one of the three functions of equality bodies should be ‘providing independent assistance to victims’.⁶ Although the RED does not define the concept of ‘assistance’,⁷ the term is used in the context of supporting victims ‘in pursuing their complaints about discrimination’, which can be interpreted as requiring the provision of legal advice,⁸ or at least some sort of advice on the legal options to pursue a complaint. What is nevertheless clear is that it must be *independent* assistance. In this regard, some commentators consider that independence is not required of the body itself, but rather of the functions it performs,⁹ whilst others interpret that the equality body itself must be organically and financially independent because this is necessary for performing its functions independently.¹⁰

In the same vein, most international and European human rights organisations suggest that equality bodies’ members should not be appointed by the government, and they should have a stable mandate to be protected against ‘arbitrary dismissal’.¹¹ Their composition should be diverse to ensure plurality¹²

⁶ The other two functions are conducting surveys and issuing reports and recommendations.

⁷ For a discussion see B de Witte, ‘New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance’ (2011) 60 *American Journal of Comparative Law* 49, 66.

⁸ This opinion is advocated in FRA, *The Racial Equality Directive: application and challenges* (FRA 2012) 10-11. See also M Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (Eleven 2011) 235, but cf De Witte, *ibid*.

⁹ M Bell, ‘Meeting the Challenge? A Comparison between the EU Racial Equality Directive and the Starting Line’ in I Chopin and J Niessen (eds), *The Starting Line and the Incorporation of the Racial Equality Directive into National Laws of the EU Member States and Accession States* (MPG 2001) 22, at 48; De Witte (n 7) 66.

¹⁰ G Moon, ‘Chapter Eight. Enforcement Bodies’ in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007) 871, 888; Ambrus (n 8) 345-346.

¹¹ ECRI, ‘General Recommendation No 2. Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level’ (1997) CRI(97)36 (‘Rec No 2’), Principle 5. See also UNGA, ‘Res 48/134 on National institutions for the promotion and protection of human rights’ (1993) UN doc A/RES/48/134 (‘Paris Principles’).

¹² Paris Principles, *ibid*. This resolution emphasises that Government departments having representation in the equality bodies ‘should participate in the deliberations only in an advisory capacity’. See also Commissioner for Human Rights, ‘Opinion on national structures for promoting equality’ (Council of Europe 2011) CommDH(2011)2.

and they should have the power to appoint their own staff.¹³ Furthermore, they should have enough funds to carry their functions and be able to manage them without government control.¹⁴

The RED refers to equality bodies as the main ‘assistance providers’, but at the same time it implicitly recognises the role that ‘associations, organisations or other legal entities’ play as support and advice providers.¹⁵ International soft-law also suggests that filters’ interaction and cooperation can add value to the work of equality bodies and create synergies to effectively tackle discrimination.¹⁶

The role of trade unions is also acknowledged in article 11(1) of the RED, which underlines the importance of ‘social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practice, collective agreements, codes of conduct, research or exchange of experiences and good practices’. In addition, article 11(2) of the RED encourages MS to promote ‘agreements laying down anti-discrimination rules [...] which fall within the scope of collective bargaining’.

On this basis, the next sections focus on the role played by British and Spanish race equality bodies as assistance providers, paying special attention to their interaction with NGOs (6.2.2.1), and on the assistance provided by trade unions to individuals (6.2.2.2).

6.2.2 British and Spanish filters

6.2.2.1 Equality Bodies and NGOs – how to provide quality advice at local level?

As discussed in Chapter 4, the national equality bodies with competences in the field of racial discrimination are the British Equality and Human Rights Commission (‘EHRC’) –a multi-ground body– and the Spanish Race Equality

¹³ ECRI, Rec No 2 (n 11).

¹⁴ *ibid*; Paris Principles (n 11).

¹⁵ Article 13(2) of the RED states that equality bodies’ assistance is ‘without prejudice’ of these organisations’ rights to engage in the defence of victims’ rights.

¹⁶ Paris Principles (n 11); Commissioner for Human Rights (n 12). See also R Poláček (ed), *The Role of NGOs and Trade Unions in Combating Discrimination* (Commission (EC) 2009); Equinet, *Equality Bodies Combating Discrimination on the Ground of Racial or Ethnic Origin* (Equinet 2012) 12-13.

Council ('SREC')¹⁷ –a single-ground body.¹⁸ Whilst both are promotion bodies, they have different backgrounds, different internal structures and different powers. Additionally, some references will be made to the *Oficina per la No Discriminació*, a local equality body set up by the Barcelona City Council in 1998.¹⁹

As noted earlier, a first crucial aspect is whether these bodies are able to perform their duties independently. At first sight, the EHRC institutional configuration seems to offer more safeguards to ensure independence than that of the SREC,²⁰ but a careful analysis of the latest EHRC financial arrangements suggests that its real independence has been curtailed.

Both the EHRC and the SREC are accountable to a Government Department: the EHRC is attached to the Government Equalities' Office ('GEO'), and the SREC to the Institute for Women and Equal Opportunities, which is attached to the Ministry of Health, Social Services and Equality.²¹ However, the EHRC is as an 'independent arm's length body'²² governed by a Chair and a board of Commissioners, who are independent from the Government.²³ They are appointed through an open competition based on knowledge, experience, suitability and desirability.²⁴ In contrast, the SREC is governed by a standing committee of four members selected out of its plenary members, who are

¹⁷ In Spanish, *Consejo para la Eliminación de la Discriminación Racial o Étnica*.

¹⁸ Since September 2014 the SREC is attached to the Institute for Women and Equal Opportunities (*Instituto de la Mujer y para la Igualdad de Oportunidades*), which is the equality body with competences in the field of sex discrimination. Its powers have now been extended to other discrimination grounds, but it remains to be seen how this will be translated into practice. See Ley 15/2014, de 16 de septiembre, de racionalización del Sector Público y otras medidas de reforma administrativa, arts 17-18.

¹⁹ M Grigolo, 'Incorporating cities into the EU anti-discrimination policy: between race discrimination and migrant rights' in M Möschel, C Hermanin and M Grigolo (eds), *Fighting Discrimination in Europe. The Case for a Race-Conscious Approach* (Routledge 2013) 115,120.

²⁰ Remarkably, the ECRI required greater independence safeguards for the SREC, whilst no concern was expressed regarding the EHRC. ECRI, 'Report on the United Kingdom. Fourth Monitoring cycle' (2010) CRI(2010)4, paras 68-73; ECRI, 'Report on Spain. Fourth monitoring cycle' (2010) CRI(2011)4, paras 28-37.

²¹ *Ministerio de Sanidad, Servicios Sociales e Igualdad* ('MSSI'). See Ley 15/2004, de 16 de septiembre, de racionalización del Sector Público y otras medidas de reforma administrativa, arts 17-18.

²² EHRC, 'Governance' <www.equalityhumanrights.com/about-us/governance/> accessed 9 January 2014.

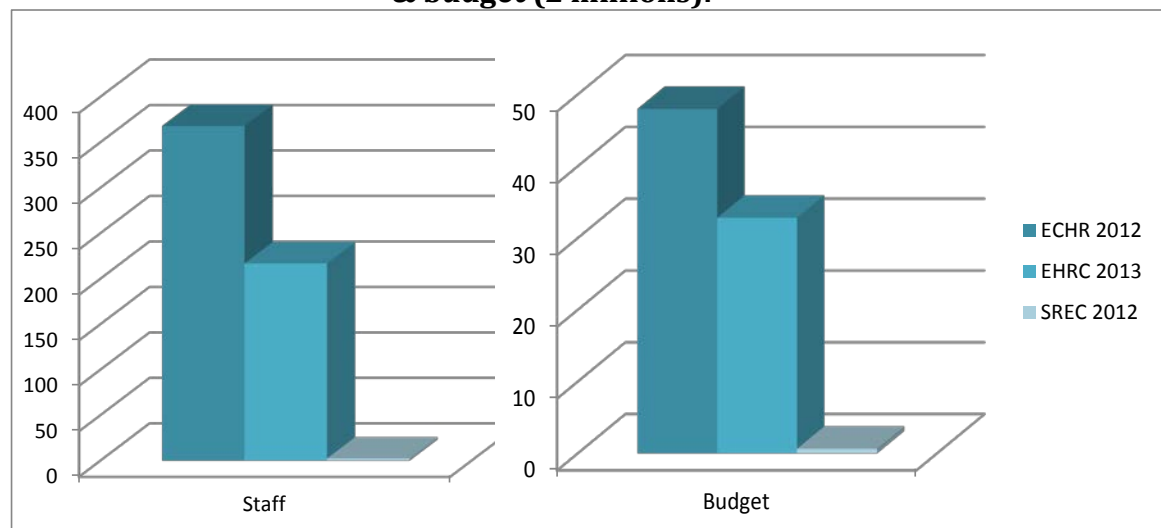
²³ Yet, this has not prevented some of its former Commissioners from being accused of conflicts of interests, see Joint Committee on Human Rights ('JCHR'), 'Equality and Human Rights Commission', 13th Report of Session 2009-10, at 73-77 and ev 2, 10-11, 29-31, 46, 49.

²⁴ *ibid*, ev 78-79. However, in this report the JCHR criticized the outcomes of this selection procedure for not ensuring 'representation from across the political spectrum' in the EHRC board, paras 51-52.

representatives from different layers of central, regional and local government, business organisations, trade unions and NGOs.²⁵ Out of all the plenary members, more than 30% are directly appointed by the Government.²⁶

Another key difference is that the EHRC appoints its own permanent staff²⁷ (217 individuals in 2013),²⁸ whilst the SREC's staff are formed by three civil servants working on a part-time basis and an external full-time advisor²⁹ (see Figure 5).

Figure 5. The ECHR and the SREC staff (full-time employees) & budget (£ millions).*



Source: Own elaboration with data from ECHR, SREC and Equal Opportunities Review.

*Note that the SREC covers only one ground (racial discrimination) whilst the EHRC covers *inter alia* race, gender, disability, age, religion and broader human rights issues.

Nevertheless, from a financial point of view, the EHRC's margin of manoeuvre has been drastically reduced. Its budget is being cut from £70 million

²⁵ RD 1262/2007, de 21 de septiembre, por el que se regula la composición, competencias y régimen de funcionamiento del Consejo para la Promoción de la Igualdad de Trato y no Discriminación de las Personas por el Origen Racial o Étnico, art 4. NGOs are appointed through an open competition, see Orden TAS/113/2008, de 23 de enero, and Orden SSI/2602/2012, de 22 de noviembre.

²⁶ This includes the Chair, who is appointed 'among persons of recognised standing and professional experience' in racial discrimination matters, and the Secretary, who is the Director of the Spanish Monitoring Centre on Racism and Xenophobia ('OBERAXE'), see RD 1262/2007, *ibid*.

²⁷ EqA 2006, sch 1, s 7(1)(b).

²⁸ EHRC, *Annual Report and Accounts 1 April 2012 – 31 March 2013* (House of Commons 2013) 11.

²⁹ SREC, *Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin - Spain* (MSSI 2012)

<http://www.equineteurope.org/IMG/pdf/PROFILE_REEC_ES-2.pdf> accessed 10 January 2014. However, since September 2014 it can receive support from the Institute for Women and Equal Opportunities, Ley 15/2014 (n 18), art 18.

in 2006-07 to £32 million in 2012-13³⁰ and £26 million 2014-15 (a total reduction of 62%),³¹ which can seriously compromise its resources to perform its core functions.³² However, it will remain significantly higher than the SREC's budget, which was €0.665 million in 2012.³³ It should be noted, though, that the SREC resources are allocated only to racial discrimination policy, whilst the ECHR resources are distributed between several discrimination grounds and human rights' work.

Following these cuts, the EHRC structure has been reshuffled and 'many of the posts dealing with the public, such as caseworkers, advisers, policy officers, grants officers and regional staff' have been removed³⁴ (see Figure 5). In addition, the EHRC's dependence on the GEO has been tightened³⁵ through a document which establishes spending controls according to 'value for money only'.³⁶ In the last years the EHRC has been deprived of nearly all the mechanisms which operated as access points for victims. Whilst its predecessor, the Commission for Racial Equality ('CRE'), had regional offices which gave direct assistance to victims;³⁷ the work of the EHRC is nowadays much more centralised in London and it does not have any direct means of contact with citizens.³⁸ When the regional presence decreased, the EHRC started providing direct legal advice through its helpline, which dealt with 50,563 inquiries between 2008 and 2009.³⁹ According to the EHRC, it was 'an excellent source for getting information on

³⁰ M Rubenstein, 'EHRC commissioners and budget' [2013] Equal Opportunities Review, Issue 223.

³¹ R Syal and D Hencke, 'Budget cuts could downgrade UK rights watchdog's UN status', *Guardian* (London, 26 October 2012).

³² See eg B Hepple, 'Agency Enforcement of Workplace Equality' in L Dickens (ed), *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Hart 2012) 49, 59; A McColgan, *Report on Measures to Combat Discrimination. Directives 2000/43/EC and 2000/78/EC. United Kingdom Country Report 2010* (MPG-HEC 2011) 155.

³³ SREC, 'Council for the Promotion of Equal Treatment' (n 29).

³⁴ McColgan, *Report* (n 32) 155.

³⁵ Interview with Barbara Cohen, independent equality consultant (London, UK, 6 December 2012).

³⁶ DMCS-EHRC, 'Framework Document'(1 April 2013) <www.equalityhumanrights.com/about-us/governance/> accessed 9 January 2014.

³⁷ C Boothman and M MacEwen, 'The British Commission for Racial Equality as an enforcement agency' in M MacEwen (ed), *Anti-discrimination law enforcement: A comparative perspective* (Avebury 1997) 155, 162.

³⁸ Hence, according to Sullivan: 'people doesn't see the Commission as a body which can help them, but rather as a body which is there on behalf of the Government'; interview with Wilf Sullivan, Race Equality Officer, Trade Union Congress (London, UK, 29 March 2013).

³⁹ EHRC, *Two years making changes* (EHRC 2009) 4.

individual complaints'.⁴⁰ However, in 2012 the GEO outsourced the service under the label of 'Equality Advisory Support Service' ('EASS') to Sitel,⁴¹ a company with expertise in call centres management.⁴² The EHRC has signed a Memorandum of Understanding with EASS so that the EHRC is informed about potential strategic litigation cases,⁴³ areas for test cases, etc.⁴⁴ However, there are concerns about the quality of the EASS service and the information flow between the EASS and the EHRC. For instance, Robin Allen stated:

[the] advice line has been taken away from [the EHRC] and this is a really bad decision. [I]t's been outsourced, and it's not been outsourced to a high quality provider, in my view. [The EHRC] will not have the same access to people that they have had previously, and the government is to be very seriously criticised over that. [I] know that there is a great fear amongst lawyers within the EHRC that they won't have as good flow through of cases and issues as they have done previously, because there is one more intermediary and they don't have control over it, as they should do; it was a very wrong decision, in my view.⁴⁵

Whilst the RED does not require equality bodies to support every single victim, according to Equinet 'assisting individual victims of discrimination is central to the promotion of equal treatment [...]. A national equality body which does not provide assistance to individual victims will be seen as irrelevant'.⁴⁶ Yet, the only direct interface with the public that the EHRC currently has is the *Lawyers' Referrals Helpline*, which allows solicitors to contact the EHRC on potential strategic litigation cases,⁴⁷ but it is useless for victims who are still at early stages of the discrimination dispute (ie when they have not sought advice yet).

As noted earlier, compared to the EHRC, the SREC has extremely limited resources, but arguably, it has established a better strategy for dealing with

⁴⁰ Interview with Wendy Hewitt, Deputy Legal Director, EHRC (London, UK, 29 March 2013).

⁴¹ EHRC, 'Equality Advisory Support Service' <www.equalityhumanrights.com/about-us/equality-advisory-support-service/> accessed 11 January 2014. According to this website '[t]he service is run by Sitel (a private sector organisation) working with Disability Rights UK and other partners'.

⁴² See Sitel, 'Industry Expertise. Overview' <www.sitel.com/industry-expertise/overview/> accessed 11 January 2014.

⁴³ Interview with Hewitt (n 40).

⁴⁴ EHRC, 'Equality Advisory Support Service' (n 41).

⁴⁵ Interview with Robin Allen QC, Cloisters Chambers (London, UK, 15 February 2013).

⁴⁶ Equinet, *Effective Strategies to Empower Civil Society* (Equinet 2010) 30-31. See also ECRI, Rec No 2 (n 11) principle 6.

⁴⁷ EHRC, 'Strategic human rights and equality litigation' <www.equalityhumanrights.com/legal-and-policy/strategic-human-rights-and-equality-litigation/> accessed 20 January 2014.

inquiries and providing independent assistance to individuals. After its setting up in 2009, the SREC created a network of assistance ('the Network') formed by NGOs working in the field of racial discrimination⁴⁸ and with country-wide presence: in 2011 there were 128 access points.⁴⁹ The Network is coordinated by one of the NGOs, Fundación Secretariado Gitano ('FSG'), and works on the basis of a protocol to ensure that common minimum standards are met.⁵⁰ Apart from registering individual inquiries face-to-face, it offers a wide range of services, including legal advice and guidance on the possible paths to solve the incident, negotiation and mediation, casework, and in some cases, psychological counselling.⁵¹ Since 2012 the Network also has a helpline, which increases accessibility.⁵² Overall, the Network is slowly gaining acceptance and receiving a raising number of inquiries. Whilst in 2010 it received only 235 complaints, in 2011 it registered 590, an average increase of 67% per month.⁵³ Face-to-face contact is largely preferred as a means for filing complaints, but the Network NGOs also play an active role in identifying discrimination incidents in the press (see Figure 6), which often concerns systemic discrimination.⁵⁴

⁴⁸ Currently, there are eight organisations involved: Fundación Secretariado Gitano ('FSG'); Asociación Comisión Católica Española de Migraciones ('ACCEM'); Cruz Roja Española; Fundación Cepaim; Red Acoge; Movimiento por la Paz, el Desarme y la Libertad ('MPDL'); Movimiento contra la Intolerancia; Unión Romani.

⁴⁹ Red de Centros de Asistencia a Víctimas por Origen Racial o Étnico ('Red de Asistencia'), *Memoria Anual de Resultados 2011* (SREC 2012) 3-4.

⁵⁰ *ibid* 3-5.

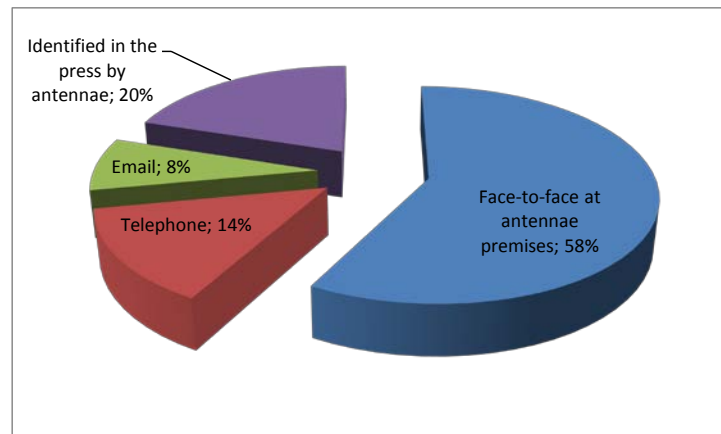
⁵¹ *ibid* 5.

⁵² Servicio de Atención a Víctimas de Discriminación Racial o Étnica
<<http://asistenciavictimasdiscriminacion.org/>> accessed 12 January 2014.

⁵³ Red de Centros de Asistencia (n 49) 5-6.

⁵⁴ Interview with Sara Giménez Giménez, Lawyer, Equality Director at FSG (Huesca, Spain, 23 April 2013).

Figure 6. Type of contact used for filing complaints before the SREC Network.



Source: Red de Centros de Asistencia a Víctimas por Origen Racial o Étnico (2012).

Despite the SREC limited resources, its Network can be praised for several reasons. First, by ‘outsourcing’ these services to specialised NGOs, the SREC complies with the RED requirement of ‘independent assistance’ in spite of its organic dependence from the Government.

Second, the Network enables the provision of face-to-face assistance throughout Spain with very limited resources.⁵⁵ This shows that reductions in the budget and the size of the EHRC do not really justify the lack of a direct interface with the public.⁵⁶ Instead of outsourcing advice provision to a generalist company, the EHRC could have strengthened ties with civil society organisations which already provided independent face-to-face advice to race discrimination victims, such as Race Equality Councils, Citizens’ Advice Bureaux (‘CAB’) and Law Centres, and which used to be funded by the EHRC itself⁵⁷ and the Legal Services Commission.⁵⁸ In its place, these funding schemes have been cut down, so these organisations’ capacity to provide legal advice has significantly decreased.⁵⁹

⁵⁵ Equinet has also emphasised the importance of equality bodies and NGOs partnerships ‘when resources are limited’, Equinet, *Effective Strategies to Empower Civil Society* (Equinet 2010) 31.

⁵⁶ This argument was put forward by EHRC representatives during the interview with Hewitt (n 40).

⁵⁷ Boothmand and MacEven (n 37) 162-163; Hepple (n 32) 63.

⁵⁸ CAB, ‘The value of employment advice at CAB 2010/2011’
<www.citizensadvice.org.uk/index/aboutus/outcomes_of_advice.htm> accessed 15 January 2014.

⁵⁹ CAB, ‘Advice Trends. Quaterly client statistics from the Citizens Advice Service (England and Wales), 2013/14 Quarter 2 (July-September 2013)’
<www.citizensadvice.org.uk/index/aboutus/publications/advice_trends.htm> accessed 15 January 2014, 10-12.

Third, Spanish NGOs belonging to the Network provide *expert legal* assistance, including legal advice and negotiation –and sometimes even psychological counselling. In contrast, the EASS only provides *general* –not *legal*– advice⁶⁰ and it is run by a generalist company, so it remains to be seen if the advice quality will be equivalent to that of the former EHRC helpline. Furthermore, the fact that only ‘distance advice’ is available can be a handicap for ethnic minorities whose first language is not English.⁶¹

Fourth, Spanish NGOs have key contacts among local authorities, employers and trade unions, which they can use to solve discrimination incidents informally and, sometimes, to address systemic discrimination ex-ante.⁶² For instance, in the framework of a local plan to boost employment in Mérida (*Pacto Local por el Empleo de Mérida*, ‘PLEM’) civil servants from the City Council contacted the manager of a clothing store to check whether he wanted to participate in a traineeship programme for young people. The manager replied positively but made clear that he ‘didn’t want Roma’ as trainees. Following this discriminatory statement, the City Council agreed with the NGO FSG to exclude the clothing store from the programme.⁶³ In other cases where Roma had been discriminated against in the access to or in employment, FSG has managed to persuade local employers to change these practices.⁶⁴ Whilst the EHRC can start investigations and litigate in strategic cases, it cannot play a similar informal networking role at grass-root level due the lack of regional and local branches. Furthermore, the weakening of British civil society organisations limits their capacity to undertake this type of actions.

Fifth, Network NGOs have promotion programmes targetting vulnerable communities, which helps them build a relationship of trust with them. Hence, they are usually the ones they turn to when they are discriminated against.⁶⁵ For

⁶⁰ EASS, ‘What we do. What we don’t do’ <www.equalityadvisoryservice.com/app/home> accessed 15 January 2014. However, the Acas Helpline can provide legal advice and arguably play a similar role to that of the Network Helpline.

⁶¹ Interview with Gay Moon, Special Legal Adviser, Equality and Diversity Forum (London, UK, 29 March 2013).

⁶² This is also the case of the Barcelona *Oficina per la No Discriminació*. For a detailed analysis, see Grigolo (n 19).

⁶³ FSG, *Informe Anual 2011. Discriminación y Comunidad Gitana* (FSG 2011) 35.

⁶⁴ *ibid* 37; FSG, *Informe Anual 2012. Discriminación y Comunidad Gitana* (FSG 2012) 41.

⁶⁵ Interview with Giménez (n 54).

instance, the Spanish Red Cross has schemes to promote migrants' employability,⁶⁶ and FSG has a successful programme focusing on Roma employability (*Acceder*).⁶⁷ Through these activities NGOs have regular contact with ethnic minorities, so they are able to spot discrimination, even when victims do not recognise it.⁶⁸ Sara Giménez, from FSG, explains:

[identifying discrimination] comes naturally [...] in the *Acceder* programme. When someone is trying to find a job, my colleagues easily realise when the candidate is not invited to an interview for racial reasons; or how it turns out that "the position has been filled" when the candidate is invited [to an interview] and the employer sees his physical appearance. My colleagues often phone the company afterwards and they are told that the position is still available.⁶⁹

Hence, these programmes allow NGOs to reduce underreporting and social lumping (ie victims' inaction), to address discrimination promptly, and even to eradicate discrimination ex-ante through positive role models.⁷⁰ For instance, a Roma woman who was rejected for a seller position at a bakery because the manager believed that 'Roma don't know how to work', was finally taken thanks to FSG mediation and even promoted for her good performance.⁷¹ In Britain, the EHRC could take advantage of similar programmes developed by NGOs to reach more effectively both ethnic minorities and employers.⁷²

The fact that the Network access points are SREC members and work under the same umbrella has several advantages. First, complaint data are collected following standardised criteria and are published in the SREC annual reports, which facilitates racial discrimination monitoring. In contrast, each British NGO collects data according to its own procedures and publishes its own reports. Second, complaints received by the Spanish Network can inform the SREC's promotion activities and action plans. Through their grass-root assistance, NGOs

⁶⁶ See eg Cruz Roja Española, 'Empleo' <www.cruzroja.es/portal/page?_pageid=659,12331033&_dad=portal30&_schema=PORTAL30> accessed 16 January 2014.

⁶⁷ FSG, *Informe Anual 2011* (n 63).

⁶⁸ Interviews with Giménez (n 54), Katrina Belsué Guillorme, Helpdesk Manager, *Sos Racismo Aragón* (Zaragoza, Spain, 29 April 2013), and Guadalupe Pulido Bermejo, Director of *Oficina per la No Discriminació* (Barcelona, Spain, 26 April 2013). See also in general, FRA (n 8) 20.

⁶⁹ Interview with Giménez (n 54).

⁷⁰ *ibid.*

⁷¹ FSG, *Informe Anual 2011* (n 63) 35.

⁷² See eg the employability programmes in Leicestershire Race Equality Centre ('LREC'), *Annual Review 2012-13* (LREC 2013) 7-8, 14.

can identify problems like systemic discrimination, so the SREC can then issue recommendations or design new promotion strategies accordingly. In fact, interaction and discussion within the SREC is promoted through its members' participation in four working groups. In contrast, the EHRC has been criticised for not engaging sufficiently with NGOs. According to the Equality and Diversity Forum:

Many stakeholders feel that the EHRC takes too little account of their views and rarely engages with them when it is developing policy, and that this limits the EHRC's effectiveness. Although in general the EHRC appears committed to formal consultation [...] there are few opportunities to engage meaningfully with the organisation when it is forming its approach to issues or for the expertise of staff in NGOs to contribute to policy development.⁷³

Third, the SREC Network has not only created synergies between its members, it has also boosted cooperation with other organisations, like the Spanish Ombudsman (*Defensor del Pueblo*), the *Oficina per la No Discriminació* and Bar Associations.⁷⁴ This can potentially boost the SREC effectiveness because, for instance, the Ombudsman can exert more political pressure, and the *Oficina per la No Discriminació* has significantly more experience than the SREC as an equality body.

Despite all these positive aspects, the SREC is far from perfect. Compared to the EHRC, it has also several weaknesses. First, the SREC is a single ground equality body, whilst the EHRC covers all protected characteristics. This can be problematic in multiple discrimination cases because the SREC may not be able to deal with all the relevant circumstances.⁷⁵ In contrast, the *Oficina per la No Discriminació* can assist multiple discrimination victims and can register up to two grounds of discrimination in its complaint forms.⁷⁶ Second, the EHRC is widely known in Britain; it is recognised as valid interlocutor by employers.

⁷³ JCHR (n 23) evidence 77; the British Institute of Human Rights expressed a similar opinion (evidence 74).

⁷⁴ Red de Asistencia (n 49) 40. However, the SREC recognises that cooperation with external bodies needs to be improved; interview with Secretaría de Estado de Igualdad, Spanish Racial Equality Council (Madrid, Spain, 24 April 2013); interview with Pulido (n 68).

⁷⁵ Since September 2014 the SREC can theoretically be supported by the Institute for Women and Equal Opportunities, with competences for all discrimination grounds, see n 19. Note, however, that in Britain some stakeholders have argued that after the merger of the former commissions into the EHRC, racial discrimination has lost visibility; interview with Cohen (n 35).

⁷⁶ Grigolo (n 19) 22.

Conversely, many stakeholders are still not aware about the existence of the SREC,⁷⁷ so the Network NGOs are not always recognised as a valid counterpart by employers.⁷⁸ Third, unlike the EHRC, the SREC cannot conduct investigations or inquiries, it cannot issue compliance notices, apply for injunctions or start legal proceedings. Although the EHRC rarely uses some of these powers, others have proved to be useful tools against institutional discrimination.⁷⁹ For instance, an EHRC inquiry in the meat and poultry processing sectors identified systemic racial discrimination ‘in terms of pay, conditions, and recruitment practices’.⁸⁰ Finally, the SREC activities are more dependent on political changes than those of the EHRC. For instance, when the national government changed in 2011, some of the SREC services came to a standstill due to the new appointments and administrative changes in the Ministry.⁸¹ Whilst the UK Government can financially control the EHRC activities, so far its activities have never been paralyzed for political reasons.

6.2.2.2 Trade unions: key equality players at the workplace

Generally speaking, trade unions can contribute to increasing the effectiveness of anti-discrimination legislation through both individual and collective action. This section mainly concerns unions’ role in supporting individual racial discrimination victims by addressing discrimination within the workplace⁸² or through formal enforcement procedures.

It has been argued that unions can address employment discrimination more effectively than NGOs or equality bodies because they have an internal network and they know the workplace culture, which can be favourable to finding

⁷⁷ This may be linked to its lack of real enforcement powers and the absence of effective information campaigns.

⁷⁸ Interviews with Secretaría de Estado de Igualdad (n 74) and Giménez (n 54); Red de Centros de Asistencia a Víctimas (n 49) 44, 46, 49.

⁷⁹ Eg the EHRC has only issued compliance notices in two occasions, see EHRC, *Annual Report and Accounts 1 April 2009–31 March 2010* (House of Commons 2011) 17.

⁸⁰ EHRC, *Meat and poultry processing inquiry review. Report of the findings and recommendations* (EHRC 2012)

<www.equalityhumanrights.com/uploaded_files/Inquiries/meat_and_poultry_processing_review_report.pdf> accessed 20 January 2014.

⁸¹ Interview with Secretaría de Estado de Igualdad (n 74).

⁸² This has been also labelled as ‘organic enforcement’, see T Colling, ‘Trade Union Roles in Making Employment Rights Effective’ in L Dickens (ed), *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Hart 2012) 183, 194-197.

a quick negotiated solution.⁸³ In addition, by addressing individual discrimination cases, unions can perceive institutional discrimination and design strategies to address it, ie launching awareness rising campaigns, training, or discussing the issue at management level.

In this regard, the strategies of British and Spanish unions are significantly different. In 2009-10 several British trade unions, including *inter alia* the Trade Union Congress ('TUC'), UNISON and Unite, developed several projects to set up and train a new type of union representative: the Equality Representative ('ER').⁸⁴ Following these projects, up to 1,400 ERs were appointed in private and public organisations.⁸⁵ By providing advice and support to individual members, ERs can *identify when a workplace problem raises equality issues*, so it can be addressed appropriately.⁸⁶ This specialisation contrasts with Spanish unions' approach, which tends to take two types of perspectives. Some unions consider that equality issues are just one more type of workplace problems. '[W]orkers belonging to racial and ethnic minorities are simply [viewed as] being workers',⁸⁷ so racial discrimination is dealt with by generalist services:⁸⁸ the union representative,⁸⁹ the sectoral department (eg construction, hospitality, etc) or the legal department. In other cases, however, racial equality issues are dealt with by unions' migration departments,⁹⁰ which once again shows that racial discrimination is still considered a migrant issue, rather than an equality issue. These two approaches may have the advantage of tackling racial discrimination disputes in a more holistic way (eg together with work permit matters), but compared to the British ERs system there is the risk that equality issues are not

⁸³ B Abbott, 'The emergence of a new industrial relations actor –the role of Citizens' Advice Bureaux?' (1998) *Industrial Relations Journal* 257, 266; D Bleiman, ' "Should I try mediation?" A discussion paper for union members' (2008) College of Law CNCR-Helwett Foundation Seed Grant White Papers. Paper 16 <http://scholarwords.gsy.edu/colpub_seedgrant/16> accessed 10 December 2013.

⁸⁴ S Moore, ' "Eyes and Ears" in the Workplace: The Developing Role of Equality Representatives' in T Wright and H Conley (eds), *Gower Handbook of Discrimination at Work* (Ashgate 2011) 265.

⁸⁵ *ibid* 265, citing TUC, *TUC Equality Reps Project Extension Report* (TUC 2010).

⁸⁶ S Moore, T Wright and H Conley, *Addressing discrimination in the workplace on multiple grounds – the experience of trade union Equality Reps* (Acas 2012) 10.

⁸⁷ P Leotti, *The Impact of the Racial Equality Directive: a survey of trade unions and employers in the Member States of the European Union. Spain* (FRA 2010) 8.

⁸⁸ *ibid*.

⁸⁹ Interview with Ana Belén Budría Laborda, In-house Lawyer at CCOO (Zaragoza, Spain, 29 April 2013).

⁹⁰ Leotti (n 87) 5.

properly addressed and that underlying institutional discrimination problems are not identified.

British and Spanish trade unions are entitled to represent victims in court. However, this tends to be very costly for the limited union resources because cases tend to be complex and hearings are longer than usual, particularly in Britain.⁹¹ For this reason, some unions are reluctant to take weak cases.⁹² Some unions, like UNISON, have also the policy of supporting victims but not taking cases to court,⁹³ so the interaction with other advice providers, like NGOs, can be useful because the latter may provide legal representation when unions cannot.⁹⁴

Both British and Spanish trade unions have implemented *awareness raising strategies* consisting in training their members or distributing booklets on equality rights.⁹⁵ In Britain, UNISON has organised training courses and published a document entitled 'Public sector equality duties'.⁹⁶ As will be discussed in Chapter 6, they also play a key role in *mainstreaming* racial equality policies and introducing *equality clauses* in negotiations and collective agreements.⁹⁷

Despite these positive aspects, British and Spanish unions have also limitations in addressing individual racial discrimination issues in the workplace. First, the potential of ERs in Britain has not been fully utilised yet⁹⁸ because they are often not given paid time-off for dealing with equality issues. 49% of TUC ERs are paid for only one hour per week,⁹⁹ and many ERs use their spare time for those purposes.¹⁰⁰

Second, unions are sometimes influenced by general policy considerations, so they may decide not to support a particular individual case if

⁹¹ D Renton, *Struck out : why employment tribunals fail workers and what can be done* (Pluto Press 2013) 105.

⁹² Abbott (n 83) 266.

⁹³ Moore (n 84) 268.

⁹⁴ Abbot (n 83) 265-267.

⁹⁵ Leotti (n 87) 9-10.

⁹⁶ M Davis, S Jefferys and E Kahveci, *The Impact of the Racial Equality Directive: a survey of trade unions and employers in the Member States of the European Union. United Kingdom* (FRA 2010) 8.

⁹⁷ See s 7.3.2.1.

⁹⁸ Davis, Jefferys and Kahveci (n 96) 18.

⁹⁹ *ibid* 8.

¹⁰⁰ Renton (n 91) 104; Moore (n 84) 272.

it plays against the union wider interests. For example, in a British equal pay case where several women brought a case against their union, the ET found that the latter 'had failed to give the claimants a fully informed choice about the options available to them'.¹⁰¹ The union did not inform them that they were being offered 'substantially less' compensation than they might receive following successful litigation because it feared that 'if they pressed for more, it might lead to job losses and to their being seen as traitors by their colleagues'.¹⁰²

Third, internal unions' dynamics may lead to indirect discrimination within the union.¹⁰³ For example, in Spain, UGT has the general policy that 'all workers must have the same rights' because it shows that everyone is equal.¹⁰⁴ A practical consequence of this policy is that UGT tends to be reluctant to negotiate special agreements for meeting ethnic minorities' needs, ie for adapting working times to Ramadan. In addition, underrepresentation of ethnic minorities in full-time positions¹⁰⁵ may discourage victims to report discrimination.¹⁰⁶ In this regard, British unions are doing better than Spanish unions in increasing ethnic minorities' representation, but even in Britain, the latter are still struggling to reach senior positions.¹⁰⁷

Finally, it should also be borne in mind that unions' affiliation in the private sector is relatively low, both in Britain (17%)¹⁰⁸ and in Spain (15%).¹⁰⁹ In addition, around 60% of private sector workers are employed in SMEs,¹¹⁰ which are less likely to be unionised. This data indicates that public sector and large

¹⁰¹ *GMB v Allen* [2008] EWCA Civ 810 (CA) [10].

¹⁰² *ibid.*

¹⁰³ Abbot (n 83) 266.

¹⁰⁴ Leotti (n 87) 8.

¹⁰⁵ M Davies, M McKenzie and W Sullivan, 'Working Against Racism: The Role of Trade Unions in Britain' in T Wright and H Conley (n 84) 132-133. See also G Kirton and A Greene, 'The dynamics of positive action in UK trade unions: the case of women and black members' (2002) 33 *Industrial Relations Journal* 157.

¹⁰⁶ See eg Abbot, who argues that victims may feel that union officials and hierarchy will be 'dismissive' about their cases (n 83) 266.

¹⁰⁷ Labour Research, 'BME leadership: how are UK unions faring?' (October 2012) <<http://www.lrdpublications.org.uk/publications.php?pub=LR&iss=1631&id=id132571>> accessed 10 June 2014. See also Chapter 7, text to n 134-135.

¹⁰⁸ Davis, Jefferys and Kahveci (n 96) 2.

¹⁰⁹ Leotti (n 87) 4.

¹¹⁰ Federation of Small Businesses, 'Small Business Statistics' (2013) <www.fsb.org.uk/stats> accessed 20 January; Ministerio de Industria, Energía y Turismo, *Retrato de las PYME 2012* (Dirección General de Industria 2012) 2.

companies' workers are likely to benefit more from unions' advice than private sector and SMEs' workers. Consequently, equality bodies and NGOs can play a key role to fill these 'advice gaps'. Nevertheless, unions' campaigns to promote equality and freely available website information may also contribute to raising awareness on equality rights among non-affiliated workers.

6.3 *Alternative dispute resolution mechanisms*

6.3.1 **How can ADR mechanisms contribute to increasing the effectiveness of the RED at national level?**

The benefits of ADR have been widely acknowledged in academic literature.¹¹¹ The purpose of this section is to revisit the potential of ADR mechanisms for increasing ex-post effectiveness of racial equality law, taking into account both the advantages and the possible risks.

A first obvious benefit of ADR systems can be facilitating an early resolution of the dispute, which can reduce litigants' financial, psychological¹¹² and time costs,¹¹³ and can also reduce the workload of the judicial system.¹¹⁴ Addressing discrimination early also facilitates informal solutions, which is often not possible when the factual circumstances are not fresh anymore or the victim has already engaged in formal action.¹¹⁵ The potential cost reduction is also higher if the selected ADR system is inexpensive. For instance, in Britain a negotiation process where no third party is involved tends to be cheaper¹¹⁶

¹¹¹ See eg J R Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401; M Gibbons, *A review of employment dispute resolution in Great Britain* (Department of Trade and Industry 2007).

¹¹² Moon (n 61).

¹¹³ See eg H Genn, *Mediation in Action. Resolving Court Disputes without Trial* (Calouste Gulbenkian Foundation 1999) 16; S Blake, J Browne and A Sime, *A practical approach to Alternative Dispute Resolution* (OUP 2011) 13. Research suggests that 'the longer the likely hearing, the greater the savings', see A Leonard and R Hunter, 'Sex discrimination and alternative dispute resolution: British proposals in the light of international experience' [1997] PL 298. Since almost one-third of discrimination claims tend to have long hearings, savings in discrimination cases can be higher than in other types of disputes; P Urwin, V Karuk and P Latreille, *Evaluating the use of judicial mediation in Employment Tribunals* (Ministry of Justice Research Series 7/10 vol 7, Ministry of Justice 2010) 53

¹¹⁴ See STC 217/1991 de 14 noviembre.

¹¹⁵ Interview Sara Giménez (n 54); Red de Asistencia (n 49) 45.

¹¹⁶ Blake, Browne and Sime (n 113) 13.

compared to judicial mediation, where the mediator is the judge¹¹⁷ and parties need to pay an additional fee.¹¹⁸

ADR mechanisms also provide flexibility to find solutions which satisfy both parties. Agreements may involve providing a reference to the claimant, committing to develop an equality plan or training managers in equal opportunities. As settlement terms are *agreed* by the parties, there is also a higher probability of compliance than with a judgment *imposed* on them by an external body.¹¹⁹

Whilst settlement and costs saving tend to be the primary aims of ADR, they are not the only potential benefit.¹²⁰ Empirical research shows that third parties 'can help managing anxiety and "heightened emotions"',¹²¹ which are often associated with legal controversies in the employment context.¹²² Even if parties do not settle, ADR procedures can help them repair a broken relationship, overcome resentment,¹²³ 'uncover misunderstandings and expose the real issues in dispute'.¹²⁴ Thus, unlike judicial procedures, which tend to create winners and losers, non-adversarial ADR procedures can reduce confrontation and build bridges between the parties to restore the employment relationship.¹²⁵ This can be a key added value for racial discrimination disputes, because most victims end up leaving employment, even if they are successful in their claims.¹²⁶

Even if a settlement is not reached, ADR mechanisms can have positive effects for both sides. On the one hand, they can help raise awareness about racial

¹¹⁷ Urwin, Karuk and Latreille (n 113) 48-56.

¹¹⁸ Ministry of Justice, 'Employment Tribunal and Employment Appeal Tribunal Fees. Stakeholder factsheet' <www.justice.gov.uk/downloads/tribunals/employment/et-fees-factsheet.pdf> accessed 15 November 2013.

¹¹⁹ Iglesias Canle (n 113) 70.

¹²⁰ Dickens has criticised that the design and evaluation of British employment ADR is cost-driven, see L Dickens, 'Employment Tribunals and Alternative Dispute Resolution' in L Dickens (ed), *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Hart 2012) 44.

¹²¹ M Hudson, H Barnes and S Brooks, *Race discrimination claims: Unrepresented claimants' and employers' views' on Acas' conciliation in employment tribunal cases* (Acas Research Paper, Acas 2007) 78.

¹²² R García Álvarez, 'Protocolo de mediación social' [2013] *Revista del Poder Judicial* 122, 124.

¹²³ R Ridley-Duff and A Benett, 'Towards mediation: developing a theoretical framework to understand alternative dispute resolution' (2011) 42(2) *Industrial Relations Journal* 106, 118.

¹²⁴ Genn, *Mediation in Action* (n 113) 16.

¹²⁵ Renedo Juárez (n 120) 12-13; R García Álvarez, 'El juez como mediador. ¿Es conveniente? ¿Es posible?' (2011) 32 *La Ley* 10-11.

¹²⁶ A Thornton and S Ghezelayagh, *Acas Individual Conciliation Survey 2012* (Acas 2013) 43.

equality legislation among claimants and their social environment. As discussed in Chapter 2, victims are often unaware of their rights or may be afraid of reporting discrimination, which leads to social lumping (ie victims' inaction). Through their participation in ADR procedures, victims realise that something can be done about discrimination and they feel empowered to take action.¹²⁷ In this respect, the role of the third party is vital because by informing victims or by referring them to support institutions, the power imbalance between the parties can be partially evened out.¹²⁸ On the other hand, through dialogue with the third party, employers can also gain knowledge on equality legislation and understand how their internal policies may be discriminatory. In the words of an Acas conciliator: 'Acas is a vehicle for understanding. Acas is a way of asking "Why has it happened?" "How has it happened?" "Would it happen again?"'.¹²⁹ Thus, ADR mechanisms can play an educational function in achieving systemic change,¹³⁰ but this will largely depend on the role played by the third party: the more contact they have with employers, the more likely they are to make adjustments.¹³¹

Despite these benefits, ADR procedures also entail risks because the power imbalance which characterises employment discrimination disputes¹³² may not exist in a civil law dispute between neighbours¹³³ or in a commercial law dispute between two similar companies.¹³⁴ This imbalance stems from the asymmetry which defines the employment relationship, but also from the claimant's scarcer resources, and in racial discrimination disputes it may also

¹²⁷ Interviews with Belsué (n 68) and Pulido (n 68).

¹²⁸ Leonard and Hunter (n 113) 8.

¹²⁹ Quoted in G Dix, 'Operating with style: The work of the Acas conciliator in individual employment rights cases' <http://www.acas.org.uk/media/pdf/0/5/Operating_with_Style-accessible-version-Jan-2012.pdf> accessed 8 July 2013, 13.

¹³⁰ Leonard and Hunter (n 113) 7.

¹³¹ *ibid*; Thornton and Ghezelayagh (n 126) 52-54.

¹³² As Wilkie puts it: 'The parties are, by definition, not equal. The essence of all complaints of discrimination is that a social good or asset [ie employment] is withheld because of the complainant's sex, race, religion, disability or other characteristic. The complainant has sought that asset and been denied. The respondent has it in his/her/its power to bestow or withhold the asset. It is not the act of discrimination which creates the power imbalance. That act merely reinforces a power imbalance already inherent in the relationship of petitioner for and distributor of social assets', M Wilkie, 'Making Mediation Work' in T Loenen and P R Rodrigues (eds), *Non-discrimination Law: Comparative Perspectives* (Kluwer 1999) 385, 395.

¹³³ O M Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 93. See also A Leonard and R Hunter (n 113) 298.

¹³⁴ cf F J Torollo González, 'La mediación laboral' [1999] Aranzadi Social 531.

derive from the claimant's different cultural background.¹³⁵ Hence, third parties should be particularly wary about discussing the weaknesses and the strengths of the case with the parties because telling claimants at an early stage that 'there [is] no scope for negotiation' is likely to undermine their confidence.¹³⁶ On the contrary, an empathetic –but impartial– third party can give claimants the strength to go further and be in a better negotiation position:

Sarah, a public sector administrator who had been in her job around twenty years, felt that her conciliator had been empathetic, had given her the impression that her case was worth pursuing and had been pivotal in its settlement. It was very important to her that the conciliator did not make her feel that her case was being "put down".¹³⁷

ADR mechanisms have also the danger of deviating racial discrimination disputes from being subject to public scrutiny¹³⁸ and deprive courts from interpreting complex discrimination concepts.¹³⁹ Furthermore, the fact that both ADR negotiations and outcomes remain confidential may undermine comparability between cases¹⁴⁰ and can be utilised for 'sweeping breaches of [equality law] under the carpet'.¹⁴¹

Finally, whilst ADR advocates argue that a legally sound solution may not always be the best solution for the parties,¹⁴² there might be private solutions which are unacceptable from an orthodox equality law perspective. It is apparent that a breach of a commercial contract due to lack of payment is different from a breach of discrimination law. In the commercial contract, the conditions for payment are agreed between the parties, and can thus be reset by them, but a discriminatory behaviour breaches the right to equality, a human right protected under public law. Thus, the fact that the parties can reach any ADR agreement

¹³⁵ Hudson, Barnes, Brooks (n 121) 71.

¹³⁶ *ibid.*

¹³⁷ *ibid.* 72.

¹³⁸ See eg J Scutt, 'Privatisation of Justice: Power Differentials, Inequality and the Palliative of Counselling in Mediation' in I Mugford (ed), *Alternative Dispute Resolution* (Australian Institute of Criminology 1986) 192; T Raymond, *Alternative Dispute Resolution as a tool for social change: a discussion of issues and evidence* (Australian Human Rights Commission 2008) <www.humanrights.gov.au/publications/alternative-dispute-resolution-tool-social-change-discussion-issues-and-evidence-2008> accessed 20 January 2014.

¹³⁹ Leonard and Hunter (n 113) 5.

¹⁴⁰ See eg T Colling, 'No Claim, No Pain? The Privatisation of Dispute Resolution in Britain' (2004) 25 *Economic and Industrial Democracy* 555, 558; Sternlight (n 111) 1462.

¹⁴¹ Boothman and MacEwen (n 37) 169.

¹⁴² R García Álvarez, 'Mediación y Juzgados de lo Social: Un encuentro entre alternativas' (2012) 5 *Revista del Poder Judicial* 44.

regarding a commercial contract can be seen as an expression of the private law principle of parties' autonomy, but it is less acceptable from a public law perspective. As Graham and Lewis explain: 'discrimination [...] represents unlawful behaviour, and so settlement in the sense of a compromise cannot be defended –it merely compounds illegal behaviour'.¹⁴³ Whilst this position may be too extreme, it suggests that ADR systems should be equipped with tools to ensure that settlements comply with minimum equality standards.

6.3.2 EU law: emphasising voluntarism and guarantees for the parties

The RED only mentions the possibility of introducing conciliation procedures where MS 'deem it appropriate'.¹⁴⁴ Hence, MS are free¹⁴⁵ to introduce (or not) conciliation or other ADR procedures.¹⁴⁶ However, EU legislation has developed ADR standards for civil, commercial and consumer law disputes, which could arguably be applied to employment and equality law.¹⁴⁷ This section reviews these standards and critically assesses whether they suit the special features of discrimination disputes.¹⁴⁸

Firstly, EU law requires that the parties have *enough information* about the chosen ADR procedure and its legal effects.¹⁴⁹ Being aware of the main features of the procedure (eg if participation precludes seeking redress through court proceedings)¹⁵⁰ and having enough time to decide whether to adhere to an ADR

¹⁴³ C Graham and N Lewis, *The Role of ACAS Conciliation in Equal Pay and Sex Discrimination Cases* (Equal Opportunities Commission 1985) 62. Similarly, Fiss argues that '[p]arties might settle while leaving justice undone. [...] Although the parties are prepared to live under the terms they bargained for [...] it is not justice itself. To settle for something means to accept less than some ideal', (n 143) 561.

¹⁴⁴ Art 7(1) RED.

¹⁴⁵ However, Ambrus considers that art 7(1) of the RED sets an obligation to explore the use of these mechanisms (n 8) 160-163.

¹⁴⁶ Art 6(1) RED. The dividing line between non-adjudicative ADR mechanisms is often difficult to draw, especially between conciliation and mediation, see eg R Sastre Ibarreche, 'Técnicas e instancias mediadoras en la resolución de los conflictos de trabajo' [2006] *Revista General de Derecho del Trabajo y Seguridad Social* 7-8.

¹⁴⁷ In some jurisdictions, like in Spain, civil law applies as supplementary law to employment law, see eg art 7(a) ETT; see M L Arastey Sahún, 'Revisando la utilización de la mediación en el ámbito de las relaciones laborales' [2013] *La Ley* 2

<<http://mediacionesjusticia.files.wordpress.com/2013/12/la-ley-armed-1312102.pdf>>.

¹⁴⁸ See *supra* s 6.3.1.

¹⁴⁹ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes [2013] OJ L165/63, art 9(2)(b), (c) and (d).

¹⁵⁰ *ibid*, art 9(2)(b).

procedure¹⁵¹ allows the parties to make an informed choice.¹⁵² This emphasis on information is relevant for discrimination disputes because victims tend to have fewer resources than employers to access expert legal advice, so information can play a key role to even out the parties' relative power. Nonetheless, third parties should remain impartial¹⁵³ –even when conveying procedural information to the parties– and be *adequately trained*,¹⁵⁴ which is crucial to ensure that the fine line between *informing* and *supporting* the parties is not crossed. As an additional guarantee to preserve impartiality, Directive 2008/52/EC establishes that mediation cannot be conducted by the judge who is responsible for the judicial proceedings concerning that dispute,¹⁵⁵ but it can be conducted by *another* judge.

Another key EU law requirement is the *enforceability* of ADR outcomes. MS should ensure that the parties can enforce the content of the settlement –when they both expressly agree to do so– ‘*unless it is contrary to the law*’.¹⁵⁶ Accordingly, whilst recognising the importance of parties' free will, EU law acknowledges the possibility to limit the enforceability of the agreement if it is illegal. This limitation is particularly welcome from an equality law perspective because it can help diminish the risk of ‘leaving justice undone’.¹⁵⁷ In this regard, the CJEU has recognised the benefits of giving *judges* the power of either endorsing ADR agreements or denouncing them if they are illegal. In a dismissal case where the CJEU had the opportunity to compare judicial and extra-judicial conciliation procedures in Spain, it highlighted that ‘an extra judicial conciliation settlement does not offer sufficient guarantees of the avoidance of abuse unlike

¹⁵¹ *ibid*, art 9(2)(d).

¹⁵² See also the European Code of Conduct for Mediators ('ECCM'), <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf> accessed 9 June 2014, para 3.1.

¹⁵³ Art 3(b) states that mediators should proceed ‘in an effective, impartial and competent way’. See also Directive 2013/11/EU, art 6(1); ECCM, paras 1.1, 2.1 and 2.2.

¹⁵⁴ Parliament and Council (EC), Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3, art 4(2).

¹⁵⁵ *ibid*, art 3(a)(2) and recital 12.

¹⁵⁶ *ibid*, art 6; see also recital 19. According to the ECCM, mediators should inform the parties on how to formalise the agreement and make it enforceable (para 3.3). See also ILO, Recommendation N092: Voluntary Conciliation and Arbitration (5th Conference Session Geneva 29 June 1951).

¹⁵⁷ Fiss (n 143).

[...] a conciliation procedure carried out in the presence of a judicial body, in which the guarantee institution has the right to intervene'.¹⁵⁸

EU legislation also stresses that ADR mechanisms should *not hinder access to justice*¹⁵⁹ (ie the running of time limits should be suspended)¹⁶⁰ and shows *preference for voluntary ADR systems*.¹⁶¹ However, EU law allows both prescriptive and voluntary ADR systems, provided they do not prevent access to justice.¹⁶² The desirability of developing mandatory or voluntary ADR systems is not specific to discrimination disputes, but it can play a central role in the effectiveness of *any* ADR mechanism. As the Commission has pointed out, 'it might serve no purpose to oblige [the parties] to participate in an ADR procedure against [their] will insofar as the success of the procedure depends on [their] will'.¹⁶³

Finally, EU law also requires the *confidentiality* of any information stemming from the ADR procedure. According to the Commission, the obligation of confidentiality should bind both the parties and the third party because 'it helps guarantee [...] the sincerity of the communications exchanged in the course of the procedure'.¹⁶⁴ The parties should have the guarantee that no one involved in the ADR process can be obliged to give evidence in judicial proceedings concerning information arising from that process.¹⁶⁵ Indeed, confidentiality is necessary in any ADR mechanism, whatever the relevant area of law, to ensure fairness and equality of arms. Furthermore, it can contribute to the take up of

¹⁵⁸ Case C-498/06 *Robledillo Núñez v Fondo de Garantía Salarial (Fogasa)* [2008] ECR I-921, paras 38-40.

¹⁵⁹ Otherwise they could amount to a breach of article 47 of the EU Charter of Fundamental Rights and article 6(1) of the ECHR. See also Parliament (EU), 'Report on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' (COM(1999) 566 – C5-0067/2000 – 1999/0253(CNS)) 37.

¹⁶⁰ Directive 2008/52/EC, art 8(1). See also recital 24; Directive 2013/11/EU, art 12 and Commission (EU), 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law' COM(2002) 196 final ('Green Paper'), paras 68-69.

¹⁶¹ See eg Green Paper, *ibid*, para 63; Parliament (EU), 'Report on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' (COM(1999) 566 – C5-0067/2000 – 1999/0253(CNS)), amendment 42.

¹⁶² Directive 2008/52/EC, arts 3(a) and 5(2). See also Commission, 'Green Paper' (n 162), para 62.

¹⁶³ Commission, 'Green Paper', *ibid*, para 64.

¹⁶⁴ *ibid*, para 79.

¹⁶⁵ Directive 2008/52/EC, art 7(1), with two exceptions, that it is necessary for reasons of public policy or to implement the agreement. See also ECCM, para 4.

voluntary ADR procedures because it makes parties 'feel safe' about the information they share. However, from an equality law perspective, it may undermine comparability between disputes and limit public awareness about discrimination. For these reasons, Leonard and Hunter advocate that 'confidentiality should apply to the mediation *process*', but the *outcome* should be public.¹⁶⁶

6.3.3 The British and Spanish systems of institutional ADR

6.3.3.1 The national ADR frameworks for employment disputes

Different versions of ADR mechanisms have existed in Britain and Spain for a long time, but it was not until the mid-1990s that ADR mechanisms for employment disputes properly developed in both jurisdictions. In Britain, the Green Paper on the reform of the industrial tribunals was issued in 1994, and the introduction of mandatory arbitration for some employment claims followed in 2001. In Spain, several regional ADR bodies were created by agreement between trade unions and business representatives ('autonomous bodies') and were legally recognised nation-wide in 1994.¹⁶⁷

Nowadays, the British and the Spanish legal systems enable conciliation both *before* (*early conciliation*) and *after* the claim has been submitted (*post-claim conciliation* or 'PCC').¹⁶⁸ Nevertheless, the take up of ADR in employment procedures has been faster in Britain than in Spain. Unlike British litigants, who have increasingly become familiar with Acas' role in dispute resolution,¹⁶⁹

¹⁶⁶ Leonard and Hunter (n 113) 9.

¹⁶⁷ These agreements were traditionally aimed at *collective* disputes resolution, and it is only recently that some of them started to be applicable to *individual* disputes, see Sastre Ibarreche (n 146) 33-34; R Tascón López, 'La solución extrajudicial de conflictos laborales en el modelo español: a medio camino entre el desideratum legal y el ostracismo legal' [2009] Revista Universitaria de Ciencias del Trabajo 209; A V Sempere Navarro (dir), *La Solucion Extrajudicial de los Conflictos Laborales* (Eolas 2014) 43-52.

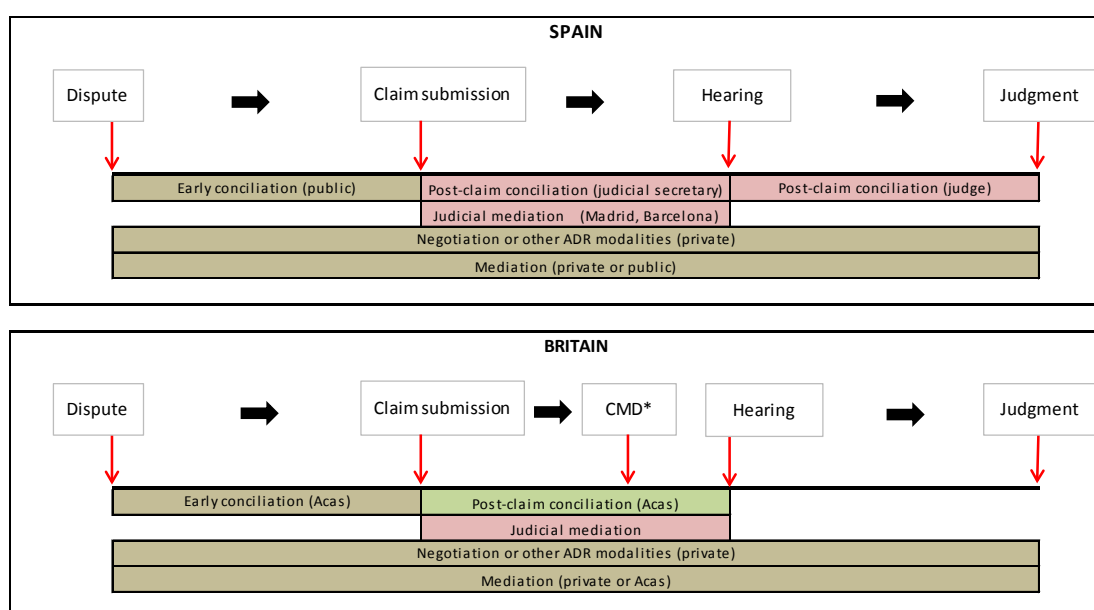
¹⁶⁸ These expressions are frequently used by Acas. 'Post-claim conciliation' ('PCC') is used to refer to conciliation which takes place *after* the claim has been submitted but before the hearing. The expression 'early conciliation' is used to refer to conciliation taking place *before* a claim has been submitted.

¹⁶⁹ G Dix and S Oxenbridge, 'Coming to the table with Acas: from conflict to co-operation' (2004) 26 Employee Relations 510, 512. A 2012 survey on Acas post-claim conciliation also shows that a notable number of respondents had had previous experiences with Acas (57% of employers, 83% of claimants' representatives and 92% of employer representatives), Thornton and Ghezelayagh (n 126) 14.

Spanish parties and solicitors hesitate to try new ADR mechanisms because the existing early conciliation and PCC systems¹⁷⁰ are bureaucratic and inefficient.¹⁷¹

Despite these different levels of acceptance, British and Spanish ADR systems for employment discrimination disputes are quite similar. Both Britain and Spain have publicly-funded early conciliation and PCC services; negotiation and mediation are possible at any stage of the dispute;¹⁷² discrimination claims are eligible for judicial mediation in Britain and this option is increasingly available in Spain too (see Figure 7).

Figure 7. Availability of ADR mechanisms in Spain and Britain as the dispute evolves.



Source: own elaboration.
*CMD: Case Management Discussion

¹⁷⁰ PCC is always mandatory but in some cases early conciliation is not, among others, in discrimination disputes followed under the fundamental rights procedure (arts 63-64 LJS; STC 81/1992 de 28 mayo and cf with STC 3/1983 de 25 enero).

¹⁷¹ H Santor Salcedo, *La mediación en los conflictos de trabajo: naturaleza y régimen jurídico: Naturaleza y régimen jurídico* (1st edn, La Ley 2006) 110; R García Álvarez, 'Mediación y Juzgados de lo Social: un encuentro entre alternativas' (2012) 5 Revista del Poder Judicial 45, 46; Arastey Sahún (n 147). However, since 2001 Spanish policy makers are making efforts to promote voluntary ADR systems for individual disputes, see eg the 2001 National Agreement for Justice Reform (*Pacto de Estado para la Reforma de la Justicia*, <<http://www.juecesdemocracia.es/pdf/pactoRefJust.pdf>> accessed 11 March 2014) at 19. In the field of disability discrimination a new arbitration system was established by Ley 51/2003, de 2 de diciembre, de Igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad, art 17.

¹⁷² In Britain, Acas arbitration is only available for unfair dismissal and flexible working claims. In Spain, it can be used in any employment disputes but it is rarely used in practice, see M L Rodríguez Fernández, 'Conciliación, Mediación y Arbitraje en España' in F Valdés Dal-Ré, (dir) (ed), *Conciliación, Mediación y Arbitraje en los Países de la Unión Europea* (MTAS 2003).

That being said, there are also some notable differences between both systems. The most significant divergences lie in PCC (see Annex 5). Whilst in Spain it is mandatory and is conducted by judicial secretaries, in Britain it is voluntary and is conducted by independent conciliators trained by Acas. Furthermore, in Spain it takes place face-to-face, whilst in Britain it is normally conducted over the phone. Yet, the positive effects of face-to-face contact in Spain are partly neutralised by the short time which is often allocated to conciliation meetings (15 to 30 minutes), whilst several weeks' time can be spent in conciliation in Britain. Finally, if there is a positive outcome, in Britain the agreement becomes binding when it is registered by the conciliator in a COT3 form and it is signed by both parties, whilst in Spain it must be endorsed by the judicial secretary (or the judge), who can refuse to do it if the agreement is against the law. Additionally, the Spanish judge can also attempt conciliation at the hearing if the judicial secretary has been unsuccessful.

There are also some relevant differences in the early conciliation procedures (see Annex 4). In Spain it is conducted by administrative bodies or third parties affiliated to autonomous bodies, whilst in Britain, it used to be a discretionary service provided by Acas. Since April 2014 it has become a mandatory first step to submit an employment claim in Britain,¹⁷³ whilst in Spain it is voluntary for discrimination disputes followed under fundamental rights procedure.¹⁷⁴ In principle, British parties are not obliged to participate effectively in conciliation, but they must contact Acas, which will issue a certificate if either party refuses to take part¹⁷⁵ and production of that certificate is required to submit the ET1 form.¹⁷⁶

Regarding judicial mediation, after a pilot carried out in 2006-2007 in Newcastle, Central London and Birmingham,¹⁷⁷ it is now available in England,

¹⁷³ Employment Tribunals Act 1996, s 18(1).

¹⁷⁴ Art 64 LJS.

¹⁷⁵ *ibid*, s 18A(4).

¹⁷⁶ According to preliminary data on Early Conciliation, only 10% of employees rejected conciliation and 18% of cases notified to Acas reached a settlement, see Acas, 'Early Conciliation Update: April - September 2014' (19 November 2014)

<<http://www.acas.org.uk/index.aspx?articleid=5069>> accessed 30 November 2014.

¹⁷⁷ Urwin, Karuk and Latreille (n 117).

Wales and Scotland.¹⁷⁸ In Spain, however, it remains in a pilot stage and it is only available in Madrid and Barcelona (although a pilot was also conducted in Bilbao in 2010-2011).¹⁷⁹ The two models are relatively similar (see Annex 6) but in Britain it is conducted by judges trained in mediation, whilst in Spain external mediators are employed. In both cases, the parties are invited to mediate by the judge, but in Spain the Social Court has more control over the process. Another relevant difference concerns the costs: in Britain the parties must pay an extra £600 in discrimination claims, whilst in Spain there is no additional fee. Finally, if the parties reach an agreement, in Britain it must be registered by Acas in a COT3 form to be binding, whilst in Spain the judge himself endorses it.¹⁸⁰

6.3.3.2 Can British and Spanish ADR systems contribute to increasing the ex-post effectiveness of racial equality law?

A good starting point for this analysis can be a comparison between settlement rates in PCC in Britain and Spain. Among the almost 276,000 cases resolved in 2012 in Spain, only 65,500 (24%) were settled through PCC, whilst in Britain, with slightly less cases resolved overall (230,000) and an acceptance rate of PCC of 70%,¹⁸¹ more cases were settled: 76,200 (33%). In other words, the settlement rate is almost ten points lower in Spain than in Britain and the gap is even higher if we compare the Spanish rate¹⁸² with racial discrimination claims settlements in Britain (see Table 2).

¹⁷⁸ Blake, Browne and Sime (n 113) 290. See also Ministry of Justice, 'Employment Tribunal guidance' <www.justice.gov.uk/tribunals/employment> accessed 20 December 2013.

¹⁷⁹ García Álvarez (n 122) 47-50.

¹⁸⁰ Ministry of Justice (n 118).

¹⁸¹ Acceptance rates were 75% in 2007, 67% in 2010 and 74% in 2012, according to Thornton and Ghezelayagh (n 126) 15-16.

¹⁸² Data for racial discrimination claims are not available in Spain.

Table 2. Cases disposed in British Employment Tribunals and Spanish Employment Courts by type of outcome (2012).¹⁸³

	SPAIN*		BRITAIN**			
	All		All		Race discrimination	
Withdrawn	67000	24%	62000	27%	1400	30%
Post-Claim Conciliation	65518	24%	76200	33%	1700	36%
Judgment	123701	45%	61400	27%	1214	26%
Other types of resolution	19648	7%	30400	13%	386	8%
Total number of cases solved	275867	100%	230000	100%	4700	100%

Source: Own elaboration with data from the Spanish Employment Ministry and the UK Justice Ministry. *Data from January to December 2012. **Data from April 2011 to March 2012.

Whilst voluntariness might not be the only factor explaining these differences, these data suggest that mandatory ADR procedures do not always lead to higher settlement rates. Actually, they can have the opposite effect. In Spain the parties must attend the conciliation meeting,¹⁸⁴ so PCC is very discredited and is frequently perceived as a mere procedural hurdle.¹⁸⁵ The parties and their legal advisers are not inclined to go to the PCC meeting with the willingness to settle, and when they do, it is often to get endorsement for a prior private agreement.¹⁸⁶ In fact, in the judicial mediation pilot running in Madrid, where participation is voluntary, settlement rates tend to be significantly higher (40% in 2012, see Annex 4).¹⁸⁷

Apart from voluntariness, there are other factors which could at least partly explain why settlement rates are higher in Britain than in Spain, namely, the type of third party involved; the logistics of ADR meetings (ie when they take place and for how long), ADR styles and ADR reputation.

¹⁸³ Ministerio de Empleo, 'Anuario de Estadísticas del Ministerio de Empleo y Seguridad Social 2012' <www.empleo.gob.es/estadisticas/ANUARIO2012/index.htm>; Ministry of Justice, 'Employment Tribunals and EAT Statistics 2011-12' <<https://www.gov.uk/government/statistics/employment-tribunal-and-employment-appeal-tribunal-statistics-gb>> both accessed 15 January 2014.

¹⁸⁴ If the respondent fails to appear, PCC is not suspended but if the claimant fails to appear, his claim is deemed to be withdrawn. See art 82(3) LJS and Plaza Golvano (n 158).

¹⁸⁵ Interview with Budría (n 89).

¹⁸⁶ Santor Salcedo (n 171) 110.

¹⁸⁷ In an empirical study Genn and others also found that '[f]acilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly more efficient than blanket coercion to mediate', H Genn and others, *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice 2007).

Concerning the *type of third party*, in Spain PCC is conducted by judicial secretaries, who generally lack training in ADR skills,¹⁸⁸ whilst in Britain Acas conciliators are specifically trained to conduct conciliation and mediation sessions. Furthermore, for judicial secretaries facilitating conciliation is one of their multiple procedural tasks,¹⁸⁹ whilst for Acas conciliators conducting ADR sessions is their main duty.

To compare the *logistics* of ADR meetings and *ADR styles*, I will build on Dix, and Kressel and Pruitt, who identified three types of roles in third parties performance, namely: (1) a *reflexive role*, where the third party seeks to build trust; (2) an *informative or contextual role*, where the third party conveys legal information to the parties to ensure they are equally aware of procedural rules, their rights and the likelihood of success in court; (3) a *substantive role*, where the third party tries to 'move the parties to resolve their dispute'.¹⁹⁰ These roles are not necessarily performed successively and can be adapted to the particular circumstances of the case, but they are often decisive in reaching a settlement.

In racial discrimination cases, where claimants tend to have feelings of anger and frustration,¹⁹¹ the *reflexive role* is crucial: third parties should show understanding to parties' sensitivities to win their confidence.¹⁹² The Spanish PCC system based on face-to-face meetings may better suit this role than the telephone-based British system because face-to-face meetings are generally considered to be more effective to build trust.¹⁹³ Indeed, research on British

¹⁸⁸ See eg Plaza Golvano (n 158); R Zafra Espinosa de los Monteros, 'El papel del secretario judicial en la conciliación laboral tras la reforma de la LPL' [2010] Revista Internacional de Estudios de Derecho Procesal y Arbitraje 33 <http://e-archivo.uc3m.es/bitstream/handle/10016/11023/papel_zafra_RIEDPA_2010.pdf;jsessionid=E9AAF5ABD84C318B0A6BD1EE226FE3DC?sequence=1> accessed 17 January 2014.

¹⁸⁹ Zafra Espinosa (n 188) 15; Plaza Golvano (n 158) 19-20; C J Gómez Pozueta, 'El Cuerpo Jurídico Superior de Secretarios Judiciales: una vision sobre su nueva posición y relevancia del mismo' [2008] Noticias Jurídicas. The need to have professional mediators has been emphasised by several Spanish commentators, see eg Tascón López (n 167) 222; C Fábrega Ruiz and M Heredia Puente, 'La mediación intrajudicial. Una forma de participación del ciudadano en la justicia' [2010] Bajo Estrados 6, 8.

¹⁹⁰ Dix (n 129). Dix's model is largely based on K Kressel and D G Pruitt, *Mediation research: The process and effectiveness of third-party intervention* (Jossey-Bass management series, 1st edn, Jossey-Bass 1989).

¹⁹¹ Hudson, Barnes and Brooks (n 121) 7-8.

¹⁹² Dix (n 129) 4-6.

¹⁹³ In a survey conducted in 2012 among parties participating in PCC with Acas conciliators, only 1% of respondents had face-to-face contact with the conciliator, Thornton and Ghezelayagh (n 126) 24-25.

conciliation in racial discrimination shows that many participants ‘would have preferred some face-to-face contact with a conciliator [...] [because] this would have increased rapport’, whilst telephone contact was ‘relatively “cold” and “impersonal”’.¹⁹⁴ Similarly, conciliators perceive that ‘face to face contact with parties, especially those without representation, provide[s] the most effective means’ for building rapport with the parties.¹⁹⁵ However, building trust also requires time for listening to the parties, exchanging impressions, and showing knowledge and professionalism.¹⁹⁶ This can be even more decisive in Spain because racial discrimination victims are often –still– first generation migrants who are unfamiliar with the Spanish legal system.¹⁹⁷ Yet, the benefits of face-to-face meetings in Spain are largely neutralised by the short time spent by third parties on PCC: only 15 to 30 minutes,¹⁹⁸ whilst more than thirteen-weeks can be spent by Acas conciliators in Britain.¹⁹⁹ In contrast, in the judicial mediation pilot conducted in Bilbao (Spain) mediators spent an average of 18.2 days with the parties, which might have had an influence on the higher settlement rates.²⁰⁰

The *informative role* can also be essential in racial discrimination cases because it can partly compensate the power imbalance between the parties by making the claimant aware of the procedural options, and its time and costs implications. This information is vital for claimants –especially if they are unrepresented– because respondents tend to have more experience with ADR and court procedures. For instance, in a survey, 92% of employers’ representatives had had prior experience with Acas, whilst 83% of claimants’ representatives had.²⁰¹ Furthermore, whilst more than 50% of employers have

¹⁹⁴ Hudson, Barnes and Brooks (n 121) 61.

¹⁹⁵ Dix (n 129).

¹⁹⁶ *ibid* 5.

¹⁹⁷ Belsué (n 68).

¹⁹⁸ F Carceller Fabregat refers to the consequences of this time pressure in the PCC process, see ‘El acto de conciliación’ <<http://www.upsj.org/documentos.item.249/el-acto-de-conciliacion.html>> accessed 17 January 2014.

¹⁹⁹ In Britain, a case can follow three different tracks: fast, normal and open. Discrimination cases normally follow the open track, with an unrestricted conciliation period, due to their complexity, Thornton and Ghezelayagh (n 126) 12-13.

²⁰⁰ Consejo de Relaciones Laborales, *Memoria 2010* (Consejo de Relaciones Laborales 2011) 50. Nevertheless, the results from the Bilbao pilot should be treated with caution because the sample was very small (n 43).

²⁰¹ Thornton and Ghezelayagh (n 126) 14.

usually dealt with Acas before,²⁰² many unrepresented claimants have ‘no prior knowledge or awareness of Acas’.²⁰³ This informative role is performed by third parties both in Britain and in Spain, but with different intensities. In PCC, Spanish judicial secretaries must inform the parties about their ‘rights and obligations’,²⁰⁴ which allows them to inform both on procedural issues and substantive rights,²⁰⁵ but due to time pressure they tend to focus on procedural issues. In contrast, in Britain, Acas conciliators explain the relevant law and tribunal procedures, but they also refer to substantive aspects, especially if one or both parties are unrepresented.²⁰⁶ Yet, in performing this informative role, it is important that third parties remain impartial. In this regard, Spanish parties seem to perceive judicial secretaries as being more impartial than other type of third parties simply because they belong to a judicial body,²⁰⁷ whilst Acas conciliators need to ‘prove’ their impartiality constantly. For instance, an Acas conciliator explained that they must be very careful so that respondents ‘don’t feel that you are on the side of the applicant. [...] Employers tend more to think that you are representing the applicant, and they talk about “your client”’.²⁰⁸ On the other hand, claimants also report perceiving partiality in Acas conciliators.²⁰⁹ An unrepresented claimant stated: ‘[t]hey claim to be impartial but they are not. They get you to do what they want, what they want rather than what you want.’²¹⁰

Finally, it is through the *substantive role* that third parties try to achieve their main objective: promoting settlements. The approach largely depends on the ADR method and the third party style. In Spain, due to the traditional conciliation concept, it tends to be taken for granted that the third party will take

²⁰² *ibid.*

²⁰³ Hudson, Barnes and Brooks (n 121) 58.

²⁰⁴ Art 84(1) LJS.

²⁰⁵ Some authors claim that the law should specifically refer only to procedural issues to preserve impartiality, see J C García Quiñones, *La conciliación judicial en el proceso laboral* (Tirant Lo Blanch 2007) 55-56.

²⁰⁶ In 2012, on average, they performed these informative tasks in only 46% of cases where the parties were represented, whilst they did in 85% of cases where at least one of the parties was unrepresented, Thornton and Ghezelayagh (n 126) 28.

²⁰⁷ However, scholars have expressed concerns about the fact that when PCC fails before the SC, the judge who heard the parties in the full hearing can attempt conciliation again. This is against EU standards, according to which *another judge* should attempt conciliation. See García Álvarez (n 122).

²⁰⁸ Dix (n 195) 9.

²⁰⁹ Hudson, Barnes and Brooks (n 121) 69-72.

²¹⁰ *ibid* 72.

a passive role:²¹¹ it gives the parties the time to settle, but it is up to them to do it. However, since 2009²¹² the law requires judicial secretaries to perform ‘*mediation* functions’ to attempt to reach a *conciliation* settlement,²¹³ which seems to require a more proactive role (eg being more insistent or rewording the parties’ proposals),²¹⁴ but in practice it is taking time to change judicial secretaries’ way of working. In contrast, Acas conciliators tend to take a more interventionist approach, whilst trying to remain impartial. They ‘talk through the issues with both parties’ and they ‘facilitate negotiations between the parties’²¹⁵ without imposing a solution. They do so by transmitting proposals from one party to the other and by helping them grasp how a tribunal would view their case. For instance, they may try to make claimants understand the difficulties they may encounter to prove discrimination.²¹⁶

Inevitably, this different substantive approach to PCC has an impact on the number of settlements reached in Britain and Spain, because giving the parties a place and a time to meet is unlikely to be enough for them to settle. In racial discrimination disputes, where feelings of frustration and mistrust prevail, it is crucial that the third party takes an active approach to re-establishing communication. In Britain, in a survey on racial discrimination, Acas conciliators’ approach was acknowledged to have this positive effect: more than 50% of respondents considered that ‘Acas involvement helped get discussions started and helped move the parties closer towards resolving the case’.²¹⁷

A fourth element which can probably explain the difference in settlement rates between PCC in Spain and Britain is *ADR reputation*. Through the years Acas has built a good reputation for dealing with disputes in an impartial manner, and

²¹¹ C F Fábrega Ruiz and M Heredia Puente, ‘La mediación intrajudicial. Una forma de participación del ciudadano en la justicia’ [2010] *Bajo Estrados* 5; Arastey Sahún (n 147) 3.

²¹² Ley 13/2009, de 3 de noviembre. Ley de Reforma de la Legislación Procesal para la implantación de la nueva Oficina Judicial, art 10(55).

²¹³ This provision has been criticised by some authors because it mixes mediation and conciliation, see eg Zafra Espinosa (n 188).

²¹⁴ A more proactive role is advocated by some judicial secretaries, see F Carceller Fabregat (n 198).

²¹⁵ Blake, Browne and Sime (n 113) 320.

²¹⁶ Dix (n 129) 14.

²¹⁷ Thornton and Ghezelayagh (n 126) 5.

as result, it is trusted by both employers and employees. As an Acas conciliator put it:

[T]he big thing ACAS does is gain the trust of people. I think it's the impartial, friendly advice. When I started someone said to me, the people who will generally be let into people's homes are vicars, doctors and ACAS officials. [...] I think a lot depends on the initial contact and then the rapport you build up with people. But I think the big bonus is ACAS has got a good reputation and it's trusted.²¹⁸

Dix also points out that parties who have positive experiences with ADR procedures or bodies are more likely to rely on them in the future,²¹⁹ especially employers and legal representatives. Unlike Acas, Spanish administrative bodies and judicial secretaries have a reputation for being inefficient. The mandatory early conciliation and PCC systems are often considered useless bureaucratic hurdles²²⁰ by parties, trade unions and legal advisors alike. Consequently, the parties and their representatives approach these procedural steps with scepticism and are reluctant to try other ADR mechanisms.²²¹ Arguably, this is one of the reasons why judicial mediation take up is very slow: in 2012, only 6% of invitations were accepted (Annex 4, Table 5). However, it seems that judicial mediation could be playing a role in reversing the bad reputation of ADR mechanisms in Spain as parties and their representatives are increasingly taking the initiative to ask Judicial Mediation Services of Madrid to be considered for mediation (Annex 4, Table 6).

One additional feature of ADR systems which is not necessarily relevant to settlement rates but is pertinent in racial discrimination disputes is the *contents and enforceability of the settlement*. ADR settlements can be binding both in Britain and in Spain. However, in Spain the judicial secretary must approve the PCC settlement by decree,²²² whilst in Britain it is enough that both parties sign the Acas form where the agreement has been recorded.²²³ Similarly, in Spain,

²¹⁸ Quoted in Dix (n 129) 7.

²¹⁹ *ibid.*

²²⁰ Santor Salcedo (n 171) 110; García Álvarez (n 171) 46; Arastey Sahún (n 147).

²²¹ I Infante, 'Un diálogo entre un mediador y un abogado...' <<http://www.forjib.org/un-dialogo-entre-un-mediador-y-un-abogado>> accessed 10 January 2014.

²²² Art 84(1) LJS. Note, however, that this is not the case in early conciliation agreements reached before an autonomous body because they are directly enforceable, art 68(1) LJS.

²²³ Acas, *Conciliation Explained* (Acas 2011) 7.

judicial mediation agreements must be endorsed by the judge,²²⁴ whilst in Britain they must be recorded in an Acas form to be binding.²²⁵ Hence, in Spain the private autonomy of the parties can be limited by the judicial secretary or the judge, who can reject approving a settlement if it amounts to a serious breach of parties' rights, fraud of law or if it is contrary to public interest.²²⁶ This is not the case in Britain,²²⁷ where registering the agreement is just a formality²²⁸ and Acas does not have the responsibility to ensure that it is fair to the employee.²²⁹ Whilst from a privatist perspective the role of Spanish judicial secretaries/judges may seem too intrusive, it is more in line with EU law and it can ensure the minimum rights of the parties are guaranteed.

Overall, this comparison suggests that the British conciliation procedure may be more effective for discrimination disputes because it is facilitated by trained conciliators, who have a relatively large contact time with the parties to inform them about the law and the procedure. In contrast, in Spain it is conducted by legal secretaries with no specialist training, and it often lasts less than 30 minutes. Furthermore, whilst British conciliators take an active approach to promoting settlement and they are generally trusted by the parties because they have a good reputation, in Spain judicial secretaries take a rather passive role and ADR procedures have a low reputation. However, the Spanish conciliation procedure has a positive feature that is missing in the British system, namely, the fact that the judicial secretary or the judge may refuse to approve a settlement which breaches the parties' rights or is contrary to public interest (see Table 3).

²²⁴ García Álvarez (n 122) 143.

²²⁵ Law Society, 'Judicial Mediation. Practice Note' (6 October 2011) <www.lawsociety.org.uk/advice/practice-notes/judicial-mediation/#jm6> accessed 10 January 2014.

²²⁶ Art 84(2) LJS. Yet, once again, the problem is where to draw the line, eg how to determine if a settlement breaches the rights of the parties or those of a third party? See Plaza Golvano (n 158) 14.

²²⁷ It can only be set aside if it is invalid at common law (*Gloystarne & Co Ltd v Martin* [2001] IRLR 15 (EAT)) or the employee was under economic pressure (*Hennessey v Craigmyle & Co Ltd ACAS* [1986] IRLR 300 (CA)).

²²⁸ In *Gilbert v Kembridge Fibres Ltd* [1984] IRLR 52 (EAT) it was held that the parties' agreement was binding even if one of them refused to sign the COT3 form.

²²⁹ *Clarke v Redcar & Cleveland BC* [2006] IRLR 324 (EAT).

Table 3. Comparative summary of Spanish and British conciliation procedures.

	SPAIN	BRITAIN
<i>Third party</i>	Judicial secretary (generalist)	Acas conciliator (specialist)
<i>Reflexive role</i>	-Face-to-face -Less than 30 minutes	-(Mostly) through the telephone -Average of 18.2 days
<i>Informative role</i>	Mainly procedural information	Information on substance & procedure
<i>Substantive role</i>	Passive role	Active role
<i>ADR reputation</i>	Low	Medium-high
<i>Settlement contents</i>	-Settlement binding after approval by the judicial secretary or the judge -Approval can be rejected	-Settlement binding after registration by Acas in COT3 form -Registration is a formality

Source: Own elaboration.

6.4 Conclusion

Chapter 5 demonstrated that courts and judicial procedures have significant limitations to effectively address racial discrimination ex-post. The aim of this chapter was analysing how other actors (ie filters, like equality bodies, trade unions and NGOs), and non- adjudicatory procedures, can positively influence the effectiveness of racial equality law.

The comparative study has shown that, although British trade unions have developed better strategies to address racial discrimination in the workplace, by working in partnership with a Network of NGOs, the Spanish equality body has arguably managed to be more effective than the British EHRC in advising victims and reducing underreporting . However, compared to Spanish ADR mechanisms, the British conciliation system is probably more effective, thanks to the specialization of Acas conciliators, their active role and the longer conciliation times.

This comparison has thus highlighted that filters and ADR mechanisms have the potential to increase the effectiveness of racial equality law, but their impact varies according to several elements. Regarding filters, the analysis suggests that equality bodies are crippled without authoritative powers to act against discrimination, as it is the case with the Spanish SREC. On the other hand, even if equality bodies have enforcement powers, if they are inaccessible at grass roots level and do not have direct contact with ethnic minorities, they will not be

able to tailor their policies to social reality, so their effectiveness will also be limited, as it is the case with the British EHRC. Although having a high number of local branches may be unfeasible for publicly financed equality bodies, the Spanish example shows that building a network of access points in cooperation with specialist NGOs can be a low-cost strategy to reach ethnic minorities, which can have positive outcomes on both ex-post effectiveness (eg NGOs can help victims to promptly spot discrimination and address it) and ex-ante effectiveness (eg through informal contact, NGOs can persuade employers to hire ethnic minority candidates). In addition, the availability of a wide diversity of filters ensures that the advice needs of different types of victims are covered. For instance, trade unions are especially suited for addressing employment discrimination at early stages because they can act *within the organisation* where the dispute originates and they can promote systemic changes through their collective negotiation power. However, they also have limitations due to the unequal representation of the workforce within their structures or to the limited number of workplaces which are unionised. For this reason, NGOs can play a key role in supplementing unions, eg by providing independent legal assistance to workers who are not union members or by spotting discrimination through their promotion programmes.

Another advantage of ADR mechanisms, compared to litigation, is that parties can take ownership of the dispute by finding their *own* solution –without bearing the uncertainty of having to persuade a judge. In some cases, ADR mechanisms may also help to restore the relationship and may even have a pedagogical effect on the parties. Nevertheless, given the power imbalance which is characteristic of employment discrimination disputes and considering that equality is a public value deserving public protection, ADR mechanisms may not always be suitable to address discrimination. In some cases, the victims themselves may regret having settled a posteriori because their cases were not about money, but about justice.²³⁰ It could be argued that ADR will be more effective than litigation depending, firstly, on the features of the dispute. For

²³⁰ J Aston, D Hill and N D Tackey, *The experience of claimants in race discrimination Employment Tribunal cases* (Employment relations research series No 55, Department for Trade and Industry 2006) 145.

instance, if the employer is a small business, the power imbalance between the parties will be lower, so ADR may be more appropriate than litigation. Furthermore, if the victim wants to stay in the same employment, ADR may help reduce confrontation instead of fuelling it. Additionally, if the dispute is largely factual and/or the victim does not have strong evidence, early discussions and settlement may be more satisfactory than going through an adversarial procedure and leaving the solution to the judge.²³¹

Secondly, some ADR mechanisms may be better suited than others for dealing with discrimination. At early stages, informal negotiation may be an effective way to deal with non-serious incidents. Yet, if the discrimination dispute is becoming increasingly acrimonious, institutionalised ADR procedures can be more effective to restore communication between the parties through the intervention of a trained third party. In this regard, compared to conciliation, judicial mediation seems more appropriate to deal with discrimination disputes because mediators tend to be more proactive in rebalancing power between the parties and in promoting settlement, whilst remaining impartial. Furthermore, for the same reason, mediators can better persuade the employer about changing its internal policies, and thus, have an impact on ex-ante effectiveness too.²³² Nevertheless, to achieve these benefits, it is crucial that mediators have enough time to build rapport with the parties, and preferably, that they do it face-to-face.

As EU and international standards suggest, it is also desirable that ADR mechanisms are voluntary and confidential, and that they suspend the running of time limits. These three requirements can be met by almost any ADR system, but judicial mediation can have, in addition, other advantages which are valuable for racial discrimination disputes. First, if the system works on invitation, the selecting judge can make sure that cases where the victim is too vulnerable, the offence is too serious or key legal developments are at stake, are not eligible for mediation. This would ensure that confidentiality does not excessively undermine comparability and public scrutiny. Second, if the role of the judge is

²³¹ Leonard and Hunter (n 113) 309, citing C A McEwen, *An Evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program* (Center for Dispute Settlement 1994) 1.

²³² Empirical studies show that more involvement leads to greater changes in employers' policies, *ibid* 309.

selecting cases, but mediation is conducted by a trained mediator, mediation can take place in a more informal setting than a court and can reduce judges' workload. But, at the same time, the fact that the whole process is under the control of a court or tribunal, can ensure that there is a greater perception of impartiality for the parties and that the judge can eventually endorse the settlement and guarantee that the contents of the agreement is not illegal.

Despite the potential benefits of promoting a diverse network of filters and addressing discrimination through ADR procedures, as Chapter 2 suggested, preventing discrimination (ex-ante effectiveness) will always be more desirable than remedying it (ex-post effectiveness). For this reason, Chapter 7 further explores how employers' policies can promote equality and prevent discrimination, thereby increasing the ex-ante effectiveness of legislation and policies.

Chapter 7. Informal enforcement through employers' policies

7.1 Introduction

Chapter 5 and 6 analysed legal mechanisms to enforce the RED at national level (Ch 5) as well as the role that ADR and filters can play in increasing the chances of effective enforcement of racial equality rights (Ch 6). Whilst both of these chapters focused mainly on *ex-post* enforcement, that is, once discrimination has taken place, this last comparative chapter analyses the role of actors and factors which can contribute to promoting racial equality *ex-ante*, ie before discrimination occurs.

Arguably, *ex-ante* promotion policies can take at least two strategic approaches. On the one hand, they can target employers' policies to trigger changes in their internal policies affecting both people in employment and recruitment practices. On the other hand, they can seek to empower vulnerable communities through capacity building programmes, distributing funding among key stakeholders to overcome socio-economic disadvantage, etc. Due to space and time constraints, this chapter focuses mainly on the analysis of employers' equality policies. The nucleus of the chapter will therefore be the evaluation of the policies themselves and the incentives to implement them and/or respect them in practice. However, it will also briefly explore the role of data collection and the role of awareness raising, whenever it is relevant for the main discussion.

After briefly introducing EU law provisions and case law on the subject (7.2), the chapter analyses businesses' incentives to develop internal equality policies in Britain and Spain through three different strands. First, it discusses the role that *regulation* plays in encouraging effective equality policies in public sector employers (7.3.1), and more precisely, how equality duties are being implemented in Britain and Spain. Secondly, the chapter explores the extent to which effective equality policies are introduced *voluntarily* by private employers (7.3.2), either through collective bargaining (7.3.2.1) or at their own initiative (7.3.2.2).

7.2 Introduction to EU law provisions and case law

Among the different types of mechanisms which can be used to promote equality, *positive action*¹ is probably the one which is most frequently considered in international and European legislation. Positive action is generally ‘aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality’.² Whilst there might be different reasons for adopting positive action measures, article 5 of the RED recognises two possible rationales:³ one, forward looking –*preventing* racial disadvantages; the other, backward looking –*compensating* racial disadvantages.⁴ However, the RED –as with most international instruments–⁵ does not impose an obligation to adopt positive action measures: they are enabled, but not mandated.⁶ Still, in 2007 the Council encouraged the use of positive action and ‘the development of relevant business tools, including voluntary charters’.⁷ Similarly, a 2008 Communication recognises that ‘legislation is more effective when it goes hand in hand with progressive and

¹ This expression will be preferred over ‘affirmative action’, ‘positive discrimination’ or ‘reverse discrimination’ because it is the one which best describes the type of measures allowed under EU law and it is the one used in EU legislation. For a discussion on the other terms see C McCrudden, ‘Rethinking Positive Action’ (1986) 15 ILJ 219; C Bacchi, ‘Policy and discourse: Challenging the construction of affirmative action as preferential treatment’ (2004) 11 JEPP 128; L Waddington and M Bell, ‘Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity’ (2011) 48 CMLRev 1503.

² M Bossuyt, Special Rapporteur, Report submitted on the request of the UN Sub-Commission on the Promotion and Protection of Human Rights (17 June 2002) UN doc E/CN.4/Sub.2/2002/21, para 6.

³ A similar wording can be found in art 157(4) TFEU; Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, art 7(1) and Council Directive (EC) 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37, art 6.

⁴ Note that this is not the case of the ICERD, which refers to ‘special measures taken for the sole purpose of securing adequate advancement’ towards equal enjoyment of rights by ethnic minorities (art 1(4)).

⁵ See art 5 RED, art 1(4) ICERD and art 4(1) CEDAW. The exception is the Framework Convention for the Protection of National Minorities (Council of Europe, adopted 1 February 1995), which states that ‘the Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority’ (art 4(1)).

⁶ Whilst this is the orthodox view, Ambrus argues that ‘the requirement of effectiveness might actually require the adoption of positive action measures in order to guarantee an effective remedy’, M Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (Eleven 2011) 292.

⁷ Council (EC), Resolution of 5 December 2007 on the follow-up of the European Year of Equal Opportunities for All [2007] OJ C308/01, at 9, 23.

innovative strategies implemented by employers to manage an increasingly diverse workforce'.⁸

Nevertheless, if employers choose to introduce promotion measures, these must be *proportionate*, that is, they must be appropriate and necessary to achieve the aim of substantive equality.⁹ This entails, for example, not giving preference in selection procedures to individuals who –*objectively*– are not equally qualified.¹⁰ As Waddington and Bell point out, proportionality may also involve allowing 'more radical and long lasting positive action measures' where a group has suffered historical or especially serious disadvantage.¹¹

In practice, however, the CJEU applies the proportionality requirement differently depending on the type of measure at stake.¹² In cases involving the attainment of a *result* (eg employing someone), the policy will only be lawful if it does not give automatic, absolute and/or unconditional preference to the disadvantaged group¹³ and if it is flexible enough to take into consideration the individual circumstances of the case (eg to tilt the balance towards the candidate from the advantaged group, if appropriate).¹⁴ Yet, when the measures entail granting an *opportunity* (eg accessing training, inviting candidates to interviews¹⁵ or providing nursing facilities¹⁶) less nuanced preferential treatment may be

⁸ Commission (EC), 'Communication from the to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Non-discrimination and equal opportunities: A renewed commitment' COM/2008/0420 final.

⁹ Case C-319/03 *Briheche v Ministre de l'Intérieur* [2004] ECR I-08807, para 24. See also Cases C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-05539; C-476/99 *Lommers v Minister van Landbouw* [2002] ECR I-02891.

¹⁰ In *Abrahamsson* (ibid) it was held that hiring a candidate from the underrepresented group who is sufficiently qualified but is less qualified than a candidate of the majority group is not acceptable.

¹¹ EU law does not set any temporal limit for positive action measures, but art 1(4) ICERD states that 'they shall not be continued after the objectives for which they were taken have been achieved'. See also L Waddington and M Bell, 'Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity' (2011) 48 CMLRev 1503, 1513.

¹² O De Schutter, 'Chapter Seven. Positive Action' in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007) 757, 819. See also Case C-158/97 *Badeck v Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR I-01875, para 23.

¹³ C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-03051; *Abrahamsson* (n 9) paras 52-55; *Briheche* (n 9) para 27.

¹⁴ Case C-409/95, *Marschall*. Thus, strict quotas will normally be considered unlawful, but 'flexible result quotas' may be lawful if the rule contains specific and sensible saving clauses and it seeks to revert an *actual* disadvantage, as it was the case in *Badeck*, paras 23-38.

¹⁵ *Badeck* (n 12).

¹⁶ *Lommers* (n 9).

accepted to improve the disadvantaged group's ability 'to compete on the labour market and to pursue a career'.¹⁷

Positive action should be differentiated from *positive duties*, which normally set obligations to, *inter alia*, monitor workforce diversity, mainstream and promote equality through equality schemes and other tools.¹⁸ Positive duties tend to 'emphasise the need for equality to be pursued in a systemic fashion'¹⁹ and for that purpose, they may entail taking different types of measures, positive action being just one type of them. EU law, and the RED, in particular, does not *expressly* refer to positive duties, but some scholars have identified traits typical of these duties. For instance, Waddington and Bell refer to the duty to promote gender equality and tackle discrimination arising from articles 8 and 10 TFEU, and to the extended practice to conduct equality impact assessments.²⁰ Busstra also indicates that a duty to promote equality may derive from the concept of indirect discrimination itself, because it requires avoiding and removing apparently neutral provisions, criteria or practices putting people bearing the protected characteristic at disadvantage.²¹ From that perspective, article 2(2)(b) of the RED could be understood as subtly putting a duty on employers to prevent indirect discrimination by any possible means, at the risk of facing legal actions if they are found liable of unjustified indirect discrimination.²² Overall, it is probably too adventurous to state that the RED embraces positive duties,²³ but the European institutions have officially recognised its importance to supplement more traditional and individualistic ways of putting equality law into practice.²⁴

¹⁷ *Badeck* (n 12) para 54; *Lommers* (n 9) para 33.

¹⁸ In Europe, such duties exist in the UK (especially in Northern Ireland), Finland and Sweden, but they have also developed beyond Europe, see S Fredman, 'Equality: A New Generation?' (2001) 30 ILJ 145, 165; T Makkonen, *Equal in Law, Unequal in Fact* (PhD thesis, University of Helsinki 2010) 258-262.

¹⁹ Waddington and Bell (n 10) 1520.

²⁰ *ibid.*

²¹ M J Busstra, *The Implications of the Racial Equality Directive for Minority within the European Union* (Eleven 2011) 229-231.

²² *ibid* 229-230. However, some authors argue that the EU concept of indirect discrimination has been 'individualised' because it focuses on the effects on the concerned individual, not on the whole group. From that perspective, it is more difficult to argue that positive duties can arise from the obligation to avoid indirect discrimination, see C Barnard and B Hepple, 'Substantive Equality' (2000) 59 Cambridge Law Journal 562, 574; S Fredman (n 18) 161-162.

²³ Waddington and Bell (n 10) 1520.

²⁴ Commission (EC), 'Non-discrimination ...A renewed commitment' (n 8).

Besides positive action and positive duties, *dialogue between social partners* can also be used to promote equality at the workplace, for instance, through the introduction of equality clauses in collective agreements. In that respect, the RED establishes that Member States (MS) should promote equality through social dialogue ‘through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices’²⁵ and through the introduction of anti-discrimination rules via collective bargaining.²⁶ However, the development of such measures at national level and their effectiveness will largely depend on the relative power of social partners and on the collective bargaining system and its enforceability.

7.3 Policies to promote racial equality at the workplace at national level

Although section 7.2 suggests that at international and EU level positive action is the most widely endorsed strategy to promote equality, the implementation of positive action measures amongst British and Spanish employers is very limited. At institutional level, positive action is simply *allowed* –not *encouraged*, and given that businesses are mainly driven by profits, a priori they have little incentives to develop positive action policies on their own initiative. Hence, this section focuses first on another promotion strategy which, unlike positive action, has been encouraged through regulation, namely, public authorities’ positive duties (7.3.1.1 and 7.3.1.2). Subsequently, the analysis turns to promotion strategies voluntarily introduced by employers (including positive action measures), either through collective bargaining (7.3.2.1) or unilaterally (7.3.2.2).

7.3.1 Promoting equality through regulation

The aim of this section is to analyse whether regulation, and in particular positive duties, can trigger effective *ex ante* measures to promote racial equality. For that purpose, I first introduce British and Spanish legislation (7.3.1.1), and I then discuss its potential to yield effective race equality policies (7.3.1.2).

²⁵ Art 11(1) RED.

²⁶ Art 11(2) RED; see also Council (EC), Resolution (n 7).

7.3.1.1 British and Spanish legislation on positive duties

Whilst an obligation to develop positive duties at national level cannot straightforwardly be derived from EU law, both British and Spanish law include some form of equality duties. In Britain, an equality duty was first introduced in 2000 by amendment to the Race Relations Act 1976.²⁷ Currently, the Equality Act 2010 contains a generic duty in section 149, which establishes the obligation, for public authorities,²⁸ to have *due regard* to the need to (a) eliminate discrimination and related conducts, (b) advance equality of opportunity and (c) foster good inter-group relations. The Minister of the Crown, for England, and the Welsh and the Scottish Ministers have the power to impose specific duties in their jurisdictions to ensure a better performance with the generic duty, which they all have done by Regulation,²⁹ with different stringency levels (see Annex 9). However, for the sake of simplicity, only the English specific duties will be considered in the comparison.³⁰

The Spanish positive duty to eliminate discrimination and promote equality is embedded in article 9(2) of the Spanish Constitution ('CE'), which reads:

[i]t is the responsibility of public authorities *to promote conditions* ensuring that *equality of individuals* and of the *groups* they belong to are *real and effective*, to *remove obstacles* preventing or hindering their full enjoyment, and to *facilitate the participation* of all citizens in political, economic, cultural and social life.³¹

This provision contains a threefold duty which slightly recalls the formulation of the British duty: (a) the obligation to promote conditions to foster *real and effective* equality, (b) the obligation to eliminate obstacles to equality and (c) the obligation to facilitate citizens' full participation in society.³² Remarkably,

²⁷ Race Relations (Amendment) Act 2000, s 2.

²⁸ For the ones specified in EqA 2010, sch 19.

²⁹ Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, SI 2011/1064; Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260 ('English Regulations'); Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, SI 2012/162.

³⁰ English public authorities with less than 150 employees are not bound by some of the specific duties (English Regulations, s 2(4) and (5)).

³¹ Translation of Congreso de los Diputados, 'Constitución', <www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texo_ingles_0.pdf> accessed 30 March 2014 (author's italics).

³² R de Asís Roig, *Deberes y obligaciones en la Constitución* (PhD thesis, Universidad Carlos III 1989) 683-684.

public authorities must perform this duty for the benefit not only of *individuals* but also for that ‘*of the groups they belong to*’ (emphasis added), which shows that article 9(2) CE embraces substantive equality and group justice. This principle is one of the cornerstones of the Spanish Social and Democratic State,³³ and it is often used as an interpretative criterion to justify the lawfulness of positive action measures.³⁴ However, it is not interpreted as a direct source of duties for all public authorities. Most commentators consider that it cannot give rise to individual enforcement actions³⁵ and that it can only turn into an enforceable obligation if it is embodied in secondary legislation.³⁶

In that regard, in the field of equality law, article 9(2) CE has only been partially developed for gender, through the Gender Equality Law (‘GEL’), and to a lesser extent, for disability.³⁷ The Comprehensive Equality Bill proposed in 2011 by the former Government was deemed to further develop article 9(2) CE for all discrimination grounds,³⁸ but it was never adopted. For this reason, the positive duties developed in the GEL will be taken as the benchmark which will be compared to British positive duties.³⁹ The GEL will be used to illustrate how positive duties have developed in Spanish law for gender equality, and how they could potentially develop in the future for race and ethnic origin discrimination.⁴⁰

³³ See eg E Cobreros Mendazona, ‘Reflexión general sobre la eficacia normativa de los principios constitucionales rectores de la política social y económica del Estado’ [1987] *Revista Vasca de Administración Pública* 27; J Ferret Jacas, ‘El artículo 9.2 de la Constitución como parámetro del control de constitucionalidad’, *Introducción a los Derechos Fundamentales, X Jornadas de estudio sobre la Constitución Española* (Vol III, Dirección General del Servicio Jurídico del Estado 1988); J Rodríguez Arana, ‘Los derechos fundamentales en el Estado Social de Derecho y el Derecho Administrativo Constitucional’, *Introducción a los Derechos Fundamentales* (ibid) 1241.

³⁴ See eg SSTC 34/1981 de 10 noviembre FJ 3; 216/1991 de 14 noviembre; 28/1992 de 9 marzo; 229/1992 de 14 diciembre FJ 2.

³⁵ It could, nevertheless, give rise to an exception of unconstitutionality; see E Carmona Cuenca, ‘El principio de igualdad material en la jurisprudencia del Tribunal Constitucional’ [1994] *Revista de Estudios Políticos* 265, 282.

³⁶ *ibid.*

³⁷ RD Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social.

³⁸ Proyecto de Ley Integral para la Igualdad de Trato y la No Discriminación [BOCG 10/06/2011] (A)130-1, arts 31-36.

³⁹ The GEL positive duties apply both to public authorities and private companies (arts 11(1) and 45(1)), whilst the British positive duty applies only to the former. This section focuses on *public authorities’* equality duties in the field of employment; the GEL duties as regards private companies will be considered in s 7.3.2.2.

⁴⁰ Note that the GEL only applies mainly to *national* public authorities (not to regional and local public authorities), so the Spanish analysis focuses on *national* public authorities.

7.3.1.2 The difficulties of designing goal oriented and deliberative equality duties

To analyse the effectiveness of the British and Spanish equality duties, I will consider three criteria which have been widely recognised to be crucial for equality duties to be effective: (1) whether they are *action based* and *goal oriented* (ie if they compel to set specific goals and take measures to implement them);⁴¹ (2) if they promote *reflexive regulation* (ie if priorities and resources of the relevant institution are adapted according to evidence and consultation with stakeholders);⁴² and (3) *enforceability*.⁴³

To analyse if the duties are action based and goal oriented, I shall consider their definitions and their interpretation. In Britain, section 149(1) EqA establishes:

- A public authority must, in the exercise of its functions, *have due regard to the need to—*
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.⁴⁴

In Spain, two provisions are relevant. Firstly, article 11(1) of the GEL, which reads:

To make effective the constitutional right of equality, Public Authorities *will adopt specific measures* in favour of women to remedy manifest instances of *de facto* inequality in relation to men. These measures, which will be in force for as long as such situations continue to exist, must, in every case, be reasonable and proportionate to the objective being pursued.⁴⁵

Secondly, the 8th Additional Provision ('8AD') of the Basic Statute of Public Employees (*Estatuto Básico del Empleado Público*, 'EBEP')⁴⁶ establishes that:

⁴¹ S Fredman and S Spencer, *Delivering Equality: Towards an Outcome-Focused Positive Duty: Submission to the Cabinet Office Equality Review and to the Discrimination Law Review* (2006) 9-10.

⁴² *ibid*, 9-10,12; C McCrudden, 'Equality Legislation and Reflexive Regulation: a Response to the Discrimination Law Review's Consultative Paper' (2007) 36 ILJ 255; Interview with Gay Moon, Special Legal Adviser, Equality and Diversity Forum (London, UK, 29 March 2013).

⁴³ M Bell, 'Duties on Public Authorities to Promote Equality' [2010] PL 686; Government Equalities Office, *Review of the Public Sector Equality Duties. Report of the Independent Steering Group* (GEO 2013) 26.

⁴⁴ Author's italics.

⁴⁵ Author's translation and italics.

⁴⁶ Ley 7/2007, de 12 de Abril, del Estatuto Básico del Empleado Público.

1. Public Administrations *must observe* the right to equal treatment and equal opportunities in employment, and for this purpose, *must adopt measures* to avoid employment discrimination between women and men.
2. Notwithstanding paragraph 1, Public Administrations *must develop and implement an equality plan* through a collective agreement or through a working conditions' agreement applicable to civil servants, under the terms established thereof.⁴⁷

There is an obvious difference between the British and the Spanish provisions: whilst section 149(1) of the EqA 2010 requires public authorities to have '*due regard*' to equality and anti-discrimination needs, the Spanish provisions require them to '*adopt measures*', including an equality plan. Consequently, the EqA 2010 is more 'deferential'⁴⁸ because it requires public authorities to *consider* the need to eliminate discrimination, but it does not require them to take *actual measures*. According to Dyson LJ in *Baker*, having '*due regard*' involves considering, on the one hand, the interests of the disadvantaged groups and the inequality circumstances affecting them, and on the other hand, the 'countervailing factors [...] relevant to the function'.⁴⁹ However, Dyson LJ also noted that it is 'not a duty to achieve a result. [...] It is a duty to have due regard to the need to' eliminate racial discrimination and promote equal opportunity.⁵⁰ Hence, the duty has been criticized for giving rise to procedural compliance and box-ticking.⁵¹ In contrast, the Spanish provisions expressly oblige public authorities to take measures, instead of leaving that decision to their discretion.

Accordingly, *on paper*, the Spanish duty seems to have the potential to be more effective than the British duty, but both the British and the Spanish positive duties' provisions are too vague to encourage targeted action *in practice*. Section 149(1) of the EqA 2010 only requires having due regard to three different issues: eliminating discrimination, advancing equal opportunities and fostering good inter-group relations.⁵² The Spanish provisions are even vaguer, as they only

⁴⁷ Authors' translation & italics.

⁴⁸ See S Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60 American Journal of Comparative Law 265, 271-272.

⁴⁹ *R (Baker) v Secretary of State for Communities and Local Government and Others* [2008] EWCA Civ 141 [31]. This balancing exercise concerns only the decision-maker, so the the courts cannot interfere with the decision, see *R (Hurley and Moore) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 [77]-[78], per Elias LJ.

⁵⁰ *Baker* (ibid). See also *R (Brown) v Secretary of State for Work and Pensions and another* [2008] EWHC 3158.

⁵¹ S Fredman, *Discrimination Law* (2nd edn, OUP 2011) 307-310.

⁵² The meaning of this provision is further elaborated in sections 149(3) and (5), which are still not specific enough.

require observing the right to equal treatment and equal opportunities and taking measures to eliminate discrimination.⁵³

Nevertheless, supplementary provisions further specify the duties in both jurisdictions. In Britain, many public authorities are bound by the specific equality duties, which are ‘intended to improve performance on the general duty’.⁵⁴ However, in England the specific duties give public authorities plenty of flexibility: they can decide the scope of employees’ information published and they can set their own equality objectives.⁵⁵ In contrast, Spanish law establishes a comprehensive set of principles, criteria and policies that national public authorities must observe in their employment policies.⁵⁶

Furthermore, whilst English authorities can publish their equality information and objectives separately and for different time periods, Spanish ones must publish a consistent equality plan including not only equality information and objectives, but also the *measures* that they intend to take to reach their objectives. The *theoretical* advantage of the Spanish approach is that an equality plan is meant to be a coherent and rounded document with systematic proposals to advance equal opportunities.⁵⁷ Indeed, the British approach seems more likely to lead to a box-ticking exercise than to a real reflection on the best measures to reach the established objectives: whilst a considerable amount of English public authorities have published information about their staff (71%),⁵⁸ only 49.7% have established quantitative objectives and 48.8% have determined a timeframe for improvement.⁵⁹ For instance, the Department for Work and Pensions has fixed quantitative representation targets for employees with a

⁵³ Article 11(1) GEL and the 8th Additional Provision of EBEP.

⁵⁴ EHRC, *Assessment of the publication of equality objectives by English public authorities* (EHRC 2013) 3.

⁵⁵ Note, however, that the EHRC guide recommends that the equality objectives address the gaps identified in the equality information, see EHRC, *Equality Act 2010. Technical Guidance on the Public Sector Equality Duty. England* (EHRC 2014).

⁵⁶ Articles 51 to 67 GEL and Annex 2. In principle these do not apply to regional and local authorities, but the obligation to adopt internal equality plans laid down in 8AD binds any public authority.

⁵⁷ cf S Fredman and S Spencer, who highlight the importance of including action plans among the specific duties, (n 41) 13.

⁵⁸ EHRC, *Publishing equality information: Commitment, engagement and transparency* (EHRC 2013) 23.

⁵⁹ EHRC, *Assessment of the publication of equality objectives by English public authorities* (EHRC 2013) Table 10.

protected characteristic,⁶⁰ but at the other end, the Communities and Local Government Department ('DCLG') has set vague objectives consisting of 'align[ing] all [they] do with the Public Sector Equality Duty' or to 'becom[ing] a better department'.⁶¹

On the other hand, the obligation to adopt an equality plan does not mean that the plan will be carefully thought through and implemented. Ideally, *equality data* should be used to set up *specific objectives*, and the latter should be linked to relevant *measures* and appropriate *monitoring* and *evaluation mechanisms*.⁶² However, whilst the first equality plan of the Spanish National Administration⁶³ includes employees' data broken down by gender,⁶⁴ this was not used to establish truly specific and measurable objectives. For instance, one of the objectives was achieving 'equal representation', but the concept was not defined with specific targets. Furthermore, the plan does not establish a timeframe for completion, nor monitoring indicators, and it does not identify the bodies responsible for leading implementation. For these reasons, the plan has yielded an uneven implementation: out of five equality objectives, only one concerning training and those linked to legal requirements have been fully developed.⁶⁵ Furthermore, in some areas, only 12% of the Ministerial Departments filled in the evaluation

⁶⁰ DCLG, 'Public Sector Equality Duty. Equality Objectives 2012-2016' (DCLG 2012)

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/140061/equality-objectives-2012.pdf> accessed 15 April 2014, Table 2. See also the Ministry of Justice, 'Equality Objectives 2012-2016'

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209087/moj-equality-objectives.pdf> accessed 15 April 2014.

⁶¹ DCLG, *ibid*.

⁶² This is the methodology that the GEL requires for companies' equality plans (art 46(1)), which should apply by analogy to public authorities' equality plans. See CCOO, *Análisis y propuesta de CCOO en relación a la propuesta de función pública de plan de igualdad de la AGE* (CCOO 2010) 18.

⁶³ I Plan de Igualdad entre mujeres y hombres en la Administración General del Estado y en sus Organismos Públicos (Resolución de 20 de mayo de 2011, BOE 01/06/2011).

⁶⁴ Pay data are not provided because civil servants' salaries are linked to their grade, which is considered a 'neutral' criterion. However, the plan recognises the allocation of pay supplements to monitor whether it is gender-biased.

⁶⁵ Ministerio de Hacienda y Administraciones Públicas, 'Informe Ejecutivo sobre el seguimiento realizado al "I Plan de Igualdad entre Mujeres y Hombres en la Administración General del Estado y en sus Organismos Públicos' (2013)

<<http://www.igualdadnlaempresa.es/novedades/noticias/docs/b6f86ccc9f1ca767ca782e62fe7a941.pdf>> accessed 25 June 2014.. See also CSIF, 'La Administración General del Estado incumple su propio Plan de Igualdad entre hombres y mujeres' (10 January 2014)

<<http://www.csi-f.es/content/la-administracion-general-del-estado-incumple-su-propio-plan-de-igualdad-entre-hombres-y-mu-0>> accessed 14 April 2014.

forms.⁶⁶ Hence, the Spanish experience suggests that whilst equality plans seem in principle preferable to the publication of equality information and objectives separately, they will only achieve better results if they set specific and measurable benchmarks, and the relevant public authority devotes the necessary resources to engage its staff in the execution of the plan.

Concerning *participation*,⁶⁷ whilst the former British Government considered that engaging with employees was one of ‘the key principles which underpin the effective performance of public sector equality duties’,⁶⁸ the current legal framework does not provide ‘enough carrot or stick to make engagement with interest groups an essential feature of the public sector equality duty’.⁶⁹ In fact, the English specific duties do not require any type of consultation with the workforce or interest groups. In contrast, Spanish public authorities are required not only to engage with persons affected by equality policies, but also to *actually negotiate* equality plans with employees’ representatives.⁷⁰ Hence, whilst in Spain equality plans cannot be adopted without the agreement of the relevant trade unions, equality objectives can be unilaterally adopted by English public authorities, which limits the equality duties’ potential to trigger actions tailored to the needs of the workforce. It seems, however, that the Spanish participative structures are not utilised to their full potential, as they are mainly used when an equality plan needs to be negotiated, instead of being a regular forum for discussion for equality issues and for the evaluation of the equality plan.⁷¹

Finally, regarding *enforcement*, both Britain and Spain lack real ‘watchdog’ institutions who take action if the equality duties are not observed. The Spanish

⁶⁶ Ministerio de Hacienda y Administraciones Públicas, *ibid* 6.

⁶⁷ See a theoretical analysis in Fredman (n 48) 281.

⁶⁸ DCLG, *Discrimination Law Review. A Framework for Fairness. Proposals for a Single Equality Bill for Great Britain. A consultation paper* (2007), <<http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/documents/corporate/pdf/325332.pdf>> accessed 20 June 2014, at 5.43-5.44. The courts have also emphasised the importance of consultation, see *R (Luton BC and Nottingham City Council) v the Secretary of State for Education* [2011] EWHC 217 [114].

⁶⁹ B Hepple, ‘Enforcing equality law: two steps forward and two steps backwards for reflexive regulation’ (2011) 40 ILJ 315, 332.

⁷⁰ Art 64 GEL; 8AD EBEP.

⁷¹ CSI-F, ‘CSI-F pide que se convoque urgentemente la Comisión Técnica de Igualdad dependiente de MGNAGE’ (11 September 2012) <<http://www.csi-f.es/content/csi%E2%80%A2f-pide-que-se-convoque-urgentemente-la-comision-tecnica-igualdad-dependiente-de-mgnage>> accessed 14 April 2014.

Racial Equality Council ('SREC') lacks any enforcement power; only the Spanish Ombudsman can initiate investigations and issue non-binding recommendations.⁷² On the contrary, theoretically, the British Equality and Human Rights Commission ('EHRC') has powers to issue compliance notices⁷³ and to bring judicial review proceedings on its own name,⁷⁴ but compared to the prior Commission for Racial Equality, which took action regarding more than 200 cases,⁷⁵ the EHRC has only issued two compliance notices since its creation, in 2006,⁷⁶ and has brought judicial review proceedings on just one occasion.⁷⁷ It has been argued that this limited activity is due to the EHRC's more limited resources and powers.⁷⁸ For instance, trade unions have reported that the EHRC dropped a case against a local authority because 'it didn't fit with the EHRC's priorities'.⁷⁹ As a result, NGOs have warned that public authorities are not concerned about enforcement because they 'do not believe there are any sanctions or consequences of non-compliance', and regulatory bodies and inspectors have also pointed that 'some sectors cut corners as they [are] unlikely to be challenged'.⁸⁰ Hence, whilst EHRC's powers were meant to be the main enforcement device in Britain, *in practice*, it is judicial review which has become the main enforcement tool,⁸¹ but employment tribunals do not have jurisdiction

⁷² This power has been used in one occasion to recall that the Spanish Bioethics Committee is bound by the GEL, so at least 40% of its members must be women, whilst only 1.2% of the appointees were; Defensor del Pueblo, *Informe Anual a las Cortes Generales 2013* (Defensor del Pueblo 2014) 229; Comité de Bioética, 'Miembros' <www.comitedebioetica.es/miembros/> accessed 16 April 2014.

⁷³ EqA 2006, s 31-32. Note that it must first issue the terms of reference and publish an assessment report.

⁷⁴ *ibid*, s 21.

⁷⁵ K Godwin, 'Race equality: an ongoing obligation' (2006) 154 *Equal Opportunities Review* 13, 20.

⁷⁶ See EHRC, *Annual Report and Accounts 1 April 2009-31 March 2010* (House of Commons 2011) 17. The EHRC has recently issued assessment reports on English and Scottish public authorities' compliance with the specific duties; it will be interesting to see whether the EHRC takes action against those public authorities who have not complied with the duty.

⁷⁷ *R (EHRC) v Secretary of State for Justice and Another* [2010] EWHC 147.

⁷⁸ Fredman (n 48) 270; Government Equalities Office, *Review of the Public Sector Equality Duty. Report of the Independent Steering Group* (GEO 2013) 26; S Milner and A Gregory, 'Gender equality bargaining in France and the UK: An uphill struggle?' (2014) 56 *Journal of Industrial Relations* 246, 253.

⁷⁹ Government Equalities Office, *Review of the Public Sector Equality Duty. Report of the Independent Steering Group* (GEO 2013) 26.

⁸⁰ *ibid*.

⁸¹ M Bell, 'Judicial Enforcement of the Duties on Public Authorities to Promote Equality' [2010] PL 672; Fredman (n 48) 265-267, 270. A study identified 27 judicial review cases raising equality duties issues between July 2010 and February 2012, but this is still a small number

to enforce the equality duties. Nevertheless, public authorities' employees could rely on a breach of the duties to shift the burden of proof to the employer in employment proceedings,⁸² and trade unions have also used the duties to put pressure on public authorities targeting a disproportionate amount of ethnic minority workers for redundancy.⁸³

In Spain judicial enforcement of the equality duties has never been used against public authorities. An equivalent mechanism to the British system of judicial review could derive from Law 30/1992,⁸⁴ which allows an interested party to bring an action against an administrative act to declare it null and void⁸⁵ or voidable.⁸⁶ In the field of employment law, however, civil servants could also initiate a collective conflict (*conflict colectivo*) against their public authority/employer in case of breach of the commitments agreed in the equality plan,⁸⁷ but this enforcement procedure has had limited practical relevance so far.

Overall, the Spanish positive duty seems to have more chance to be effective. Unlike the English positive duties, which are rather deferential and procedural, the Spanish duty clearly requires public authorities to take action, it must be developed through a coherent equality plan and with the involvement of employees' representatives. However, in practice, the Spanish duty has not yielded better results than the English duties, which is probably linked to the lack of real enforcement mechanisms and to the disengagement of the workforce.

7.3.2 *The role of collective bargaining and businesses' initiatives*

After analysing the potential of *regulatory* tools like the equality duties to promote racial equality, this section focuses on the impact of *voluntarist*

compared to the total of 500 of judicial review cases registered in the same period and the thousands of employment claims filled each year, see Government Equalities Office, *ibid* 27.

⁸² cf *Abiola v North Yorkshire CC* [2010] UKEAT 0369/08 [82]-[83]; [149]-[151].

⁸³ See eg A Lipsett, 'University warned over failure to comply with racial equality code' *Guardian* (London, 26 June 2007); University and College Union ('UCU'), *Implementing the public sector equality duty* (UCU 2011) 4, 9.

⁸⁴ Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común.

⁸⁵ Art 62.

⁸⁶ Art 63.

⁸⁷ Arts 15(d) and 45(2) EBEP. Civil servants can also be sanctioned for discrimination on the basis of article 95(2)(b) EBEP, but this type of individual actions may not address the collective aspect of discrimination linked to the equality duties.

approaches, based either on collective bargaining, or on equality policies unilaterally developed by employers (at their own initiative or through the encouragement of external bodies).

7.3.2.1 *Collective bargaining, a key participative tool in need of institutional support*

British and Spanish traditions in the field of collective bargaining are markedly different. It is thus necessary to shortly outline the divergences before analysing the use of these tools to promote equality. Firstly, British collectivism has a strong voluntarist tradition which was famously characterised by Otto Kahn-Freund as ‘a system in which the state provided support for the collective self-organisation of workers and employers, but without seeking, for the most part, to shape bargaining structures and outcomes’.⁸⁸ Consequently, and despite the strong changes introduced in the 1970s and the 1980s,⁸⁹ collective bargaining is relatively ‘disorganised’:⁹⁰ it is largely based on unions’ bargaining power and employers’ willingness to cooperate.⁹¹ Unions must be ‘recognised’ by the employer in order to be able to engage in collective bargaining negotiations,⁹² and until relatively recently, there was no means of employee representation if no union was recognised in a particular workplace.⁹³ Conversely, the Spanish collective bargaining system is strongly linked to employment legislation, which establishes workers’ representation mechanisms⁹⁴ and the collective bargaining

⁸⁸ Otto Kahn-Freund cited in S Deakin and F Wilkinson, ‘The evolution of collective laissez-faire’ (2004) 17 *Historical Studies in Industrial Relations* 1.

⁸⁹ S Deakin and G S Morris, *Labour Law* (Hart 2012) 28-33.

⁹⁰ A Wilson, ‘United Kingdom: Industrial Relations Profile’ (Eurofund 2012) <www.eurofound.europa.eu/eiro/country/united.kingdom_4.htm> accessed 30 April 2014. Nowadays, however, the basic legal framework is established in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

⁹¹ M M Selwyn, *Law of Employment* (OUP 2006) 563.

⁹² TLRCA 1992, s 178(3). Unions can be recognised by the employer either voluntarily (*NUTGW v Charles Ingram & Co Ltd* [1977] IRLR 147; *NUGSAT v Albury Bros Ltd* [1978] IRLR 504) or through the statutory procedure (TULRCA 1992, Schedule A1).

⁹³ Additional means of representation developed with the adoption of the Council Directive (EC) 94/45 of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [1994] OJ L254/64, implemented in the UK by the Transnational Information and Consultation of Employee Regulations 1999, SI 1999/3323, s 2(2). Other representation mechanisms derived from EU law are also found in the Information and Consultation of Employees Regulations 2004 and the European Public Limited-Liability Company (Amendment) Regulations, SI 2009/2400, see Deakin and Morris (n 89) 870, 913-915, 969 ff.

⁹⁴ Estatuto de los Trabajadores, RD legislativo 1/1995, de 24 de marzo (‘ETT’), arts 62-68.

procedure.⁹⁵ Secondly, Spanish collective agreements are automatically legally binding,⁹⁶ whilst this is not the case of British agreements, which only have effects on individual employment contracts ‘with the consent, express or implied, of the individual parties’.⁹⁷ Thirdly, even if the affiliation ratio is lower in Spain (15%) than in Britain (27%), the percentage of workers who are covered by collective agreements is remarkably higher in Spain (49%) than in Britain (37%).⁹⁸ Collective agreements’ coverage used to be even higher in Spain –above 73% until 2009–⁹⁹ but it has decreased in the last three years due to recent employment legislation amendments.¹⁰⁰ Finally, in Spain, bargaining can take place at three different levels: inter-sectoral, sectoral or company level, but sectoral bargaining still affects the highest number of workers,¹⁰¹ whilst in Britain collective agreements are mainly concluded at company level.¹⁰² Nevertheless, some authors consider that company-level agreements will increase in Spain in the next years due to recent changes in employment legislation.¹⁰³

To determine whether collective bargaining can be an effective device to promote racial equality, the following aspects of the British and the Spanish systems will be analysed: (1) *regulatory and institutional support* for the insertion of equality clauses in collective agreements; (2) *bargaining levels*, ie whether collective agreements are concluded at sectoral or company level; (3) *bargaining*

⁹⁵ *ibid*, arts 82-91.

⁹⁶ *ibid*, art 82(3).

⁹⁷ Deakin and Morris (n 89) 904-905. See also TULRCA 1992, s 179 and *National Coal Board v National Union of Mineworkers* [1986] IRLR 439 (Ch). Yet, collective agreement clauses are often incorporated into individual contracts, see Wilson (n 90).

⁹⁸ *ibid*; P Sanz de Miguel, ‘Spain: Industrial Relations Profile’ (Eurofund 2012)

<www.eurofound.europa.eu/eiro/country/united.kingdom_4.htm> accessed 30 April 2014.

⁹⁹ Consejo Económico y Social, *Memoria sobre la situación socioeconómica y laboral 2009* (CES 2010) 406.

¹⁰⁰ For instance, legislation now encourages company agreements instead of multi-employer agreements, and it allows companies to opt out if they have had negative results for the last six months (art 82(3) ETT). See Sanz de Miguel (n 98).

¹⁰¹ M Izquierdo, E Moral and A Urtasun, *El sistema de negociación colectiva en España: un análisis con datos individuales de convenios* (Banco de España 2003) 10-11; Consejo Económico y Social (n 99) 403.

¹⁰² K D Ewing and J Hendy QC, *Reconstruction after the crisis: a manifesto for collective bargaining* (Institute of Employment Rights 2013) 29-41.

¹⁰³ See eg Sanz de Miguel (n 98); ‘CCOO acusa a la ELA de dinamitar la negociación colectiva’, *El País* (Madrid, 5 February 2014); FEDEA, ‘Un nuevo marco para las relaciones laborales en España’ (2012) <www.fedea.net/APIE/nuevo-marco-reforma-laboral/nuevo_marco_laboral_v2.pdf> accessed 30 April 2014.

equity, ie how unions deal with equality issues and who negotiates on their behalf;¹⁰⁴ and (4) the *type of equality clauses* which are effectively introduced in collective agreements.

Lets first consider whether collective bargaining *regulation* encourages the insertion of equality clauses in agreements. Spanish law establishes a *duty to negotiate* equal treatment *measures* in the field of gender equality,¹⁰⁵ and such measures must include, in addition, an *equality plan* for companies with more than 250 employees.¹⁰⁶ If companies do not comply with the requirement to negotiate gender equality measures, they risk to be sanctioned by the Employment Authority.¹⁰⁷ For instance, in 2013 the Spanish Labour Inspectorate verified compliance in 6,481 companies, out of which 110 were fined.¹⁰⁸ This duty has played a key role on the rise of the number of equality clauses introduced in collective agreements in Spain. According to trade unions, the number of equality plans negotiated between 2008 and 2010 increased more than 200%, and a total of 408 plans had been or were being negotiated in 2011.¹⁰⁹ In contrast, following its voluntarist tradition, British legislation does not establish any obligation to negotiate equality measures. In this regard, Wilf Sullivan (Race Equality Officer at the Trade Union Congress, ‘TUC’) explains that legally imposed policies tend to be less effective because they may not be supported by social partners, whilst collective agreements require the commitment of both sides of the industry:

[Collective agreements] are far more effective generally than legislation is sometimes. [...] Back in the 80s many full time officers negotiated these things at work... things like maternity pay, etc. And what tended to happen was that legislation used to follow the trends, rather than the other way around. One of the problems for me in the last years is that the whole thing has become legalised and individualised [...] Before I was a full time officer, I used to work in local

¹⁰⁴ L Briskin and A Muller, ‘Promoting gender equality through social dialogue: Global trends and persistent obstacles’, ILO 2011, Working Paper No 34, cited in Milner and Gregory (n 78) 247.

¹⁰⁵ Arts 85(1) ETT; 45(1) GEL.

¹⁰⁶ Arts 85(1)-(2) ETT; 45(2) GEL.

¹⁰⁷ RD Legislativo 5/2000, de 4 de agosto, por el que se aprueba el Texto Refundido de la Ley sobre Infracciones y Sanciones en el Orden Social, art 7(7).

¹⁰⁸ Inspección de Trabajo y Seguridad Social, *Actuaciones y Resultados de la Inspección de Trabajo y Seguridad Social en materia de relaciones laborales, prevención de riesgos laborales e igualdad* (MESS 2013) 10.

¹⁰⁹ E Sanz Bernal, ‘El avance de los planes de igualdad en la negociación colectiva’ [2011] Observatorio Mujer, Trabajo y Sociedad 41, 46-47. See also Consejo Económico y Social (n 99) 426.

government in a branch in a London Borough... The employer started monitoring employment and we managed to completely make them change the recruitment procedure. We got them to set targets for the amount of people who were recruited, almost like quotas. We negotiated that because there was about 40% BME population in London Borough [...] *And because we negotiated it, we had an interest in enforcing the agreements.* These were agreements between the union and the employer. It wouldn't necessarily be in the contract of employment but it would be a collective agreement between the union and the employer, which would apply to everybody, rather than being seen as a policy.¹¹⁰

Yet, the Spanish duty to negotiate equality measures is not a *material* obligation, but a *procedural* obligation,¹¹¹ which can be a useful regulatory measure –even in the British voluntarist system– to bring social partners to the negotiating table, so they can then reach their *own* agreements.

Besides the obvious importance of legislation, *external factors, like the economy or the state*, can also play a key role.¹¹² In both jurisdictions, the economic downturn has been an adverse factor for equality bargaining. Whilst British unions have issued guidance on how to negotiate equality clauses in a climate of budget cuts, they have also reported that equality policies have been diluted or not implemented properly.¹¹³ Similarly, Spanish unions have highlighted that the crisis has put employers in a stronger position because workers fear losing their jobs, which brings equality clauses down in the negotiation priority list.¹¹⁴ However, a notable difference is that, unlike the UK Government, the Spanish and Regional Governments have continued to provide funding for equality training and to promote equality plans.¹¹⁵ For instance, whilst Spanish SMEs are not obliged to negotiate equality plans, 68% of companies which received regional funding for equality plans in Catalonia in 2010 were SMEs.¹¹⁶ On the contrary, the UK Government has launched the 'Red Tape Challenge' to eliminate purported regulatory burdens on businesses,

¹¹⁰ Interview with Wilf Sullivan (London, UK, 29 March 2013). Author's italics.

¹¹¹ See R Escudero Rodríguez, 'Planes de igualdad en la Ley Orgánica 3/2007, de igualdad efectiva entre mujeres y hombres' [2007] *Relaciones Laborales* 10; F Valdés Dal-Ré, *Igualdad de género y relaciones laborales: entre la ley y la negociación colectiva* (Reus 2010) 93.

¹¹² Milner and Gregory (n 78) 247.

¹¹³ TUC, *Equality Audit 2012* (TUC 2012) 4.

¹¹⁴ UGT, 'Resumen del análisis de los convenios colectivos' (2011) 17
<http://www.ugt.es/actualidad/2011/mayo/jor-resumen_de_conclusiones.pdf>.

¹¹⁵ These support programmes are backed by art 49 GEL.

¹¹⁶ P Carrasquer Oto, 'Els plans d'igualtat: un espai de diàleg a les empreses',
<<http://www20.gencat.cat>> accessed 20 May 2014.

including equality obligations,¹¹⁷ which is increasingly undermining workers' rights and is leading employers to see equality as a low-priority area.¹¹⁸

On the other hand, however, Spanish institutional support targets almost exclusively *gender* equality, but even that targeted support seems to be having spillover effects on other grounds. The obligation and/or encouragement to introduce equality clauses in collective agreements has led some negotiators to extend those clauses to general statements condemning any type of discrimination. For instance, out of the larger 35 Spanish listed companies, 17% have collective agreements or Equality Plans with general equality statements or explicit references to respecting racial equality.¹¹⁹ Some companies have even included commitments towards the elimination of racism and xenophobia from selection¹²⁰ or promotion procedures.¹²¹ A 2010 study shows that gender equality plans have also been a key driver for the development of race equality policies in smaller companies. For instance, Pajares highlights that a hotel, a cleaning company and a delivery company introduced such policies and/or created diversity management departments when they were in the process of implementing their equality plans.¹²²

Secondly, concerning *bargaining levels*, sectoral equality clauses can be more effective than company level clauses for two main reasons.¹²³ First, sectoral trade union representatives are in a stronger position to negotiate because they are not economically dependent from their counterparts¹²⁴ and they are backed

¹¹⁷ 'Equalities Red Tape Challenge Announcement' (15 May 2012) <<http://www.redtapechallenge.cabinetoffice.gov.uk/2012/05/equalities-rtc-announcement/>> accessed 20 April 2014.

¹¹⁸ TUC, *Equality Audit* (n 113) 7.

¹¹⁹ Namely, Acerinox, ACS (Actividades de Construcción y Servicios), CaixaBank, Distribuidora Internacional de Alimentación, Iberdrola and Mapfre.

¹²⁰ ACS SA, Plan de Igualdad. Sector Construcción (25 May 2010) <http://www.ccoo.es/comunes/recursos/1/doc22471_Plan_de_Igualdad_ACS_Area_de_Construccion.pdf> accessed 21 April 2014, 10. See also Grupo Eroski, Collective agreement (BOE 30 may 2013).

¹²¹ Mapfre Grupo Asegurador, Plan de Igualdad (September 2010) <<http://www.ccoomapfre.es/convenios/>> accessed 21 April 2014, 6.

¹²² M Pajares and others, *Nous reptes y noves propostes en la gestió de la diversitat cultural a las empreses a Catalunya* (Consell de Relacions Laborals de Catalunya 2010) 112.

¹²³ See eg J Pillinger, *From Membership to Leadership: Advancing Women in Trade Unions. A Resource Guide* (European Trade Union Confederation 2010); Milner and Gregory (n 78) 252-255.

¹²⁴ G Fabregat Monfort, 'La negociación de los planes de igualdad' (2013) 29 *Relaciones Laborales* 47, 49.

by a larger workforce. Second, sectoral collective agreements tend to have wider coverage,¹²⁵ and can be a valuable means to introduce self-regulatory obligations, even if employers may be allowed to opt out under certain conditions.¹²⁶ Taking this into account, the Spanish collective bargaining system seems favourable for the introduction of equality clauses because sectoral agreements have traditionally been more widespread than company agreements. Indeed, whilst Spanish legislation exempts SMEs from negotiating equality plans, in 2009, 15% of sectoral agreements compelled companies with less than 250 workers to negotiate an equality plan.¹²⁷ So even when legislation does not impose a duty to negotiate equality plans or clauses, social partners can play a key role in *voluntarily* imposing that duty, especially when negotiation takes place at sectoral level. However, in Britain, company level agreements are the norm, and sectoral agreements the exception, especially in the private sector.¹²⁸ Whilst some voices claim that the bargaining system needs to be re-centralised,¹²⁹ it seems unlikely that the UK Government will make a move in that direction in the near future. Rather on the contrary, it is Spain which is converging towards the British decentralised model: as Figure 8 shows, the number of sectoral agreements has decreased by 65% between 2009 and 2013, and the number of workers covered by such agreements has decreased by 60%.

¹²⁵ Ewing and Hendy (n 102) at 1.6.

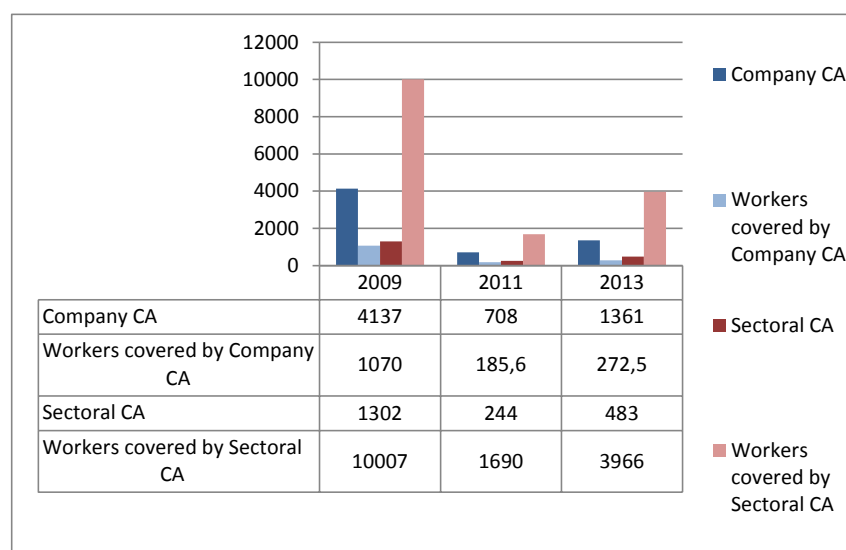
¹²⁶ That is now the case in Spain, after the last labour law reform, see art 82(3) ETT.

¹²⁷ Sanz Bernal (n 109) 42.

¹²⁸ Wilson (n 90); Sanz de Miguel (n 98) 5.

¹²⁹ Ewing and Hendy (n 102) 24-33.

Figure 8. Number of company and sectoral level agreements signed in Spain in 2009, 2011 and 2013 and number of workers covered (in thousands).



Source: Spanish Ministry of Employment (Estadística de Convenios Colectivos de Trabajo).

Thirdly, *bargaining equity* can be a determining factor in incorporating equality clauses into collective agreements.¹³⁰ Heery's quantitative research has shown that '[u]nion officers exercise discretion and can shape the bargaining agenda and for this reason their values, preferences and identities are important'.¹³¹ Hence, ethnic minorities' membership in trade unions can be considered a first key element to build a critical mass favourable to racial equality within unions.¹³² As a British union has put it: 'increasing diversity within [the union] full-time staff and on its committees begins by increasing BME membership. Full-time staff are almost uniformly people who began as lay activists who became a full-time official.'¹³³ In this respect, whilst ethnic

¹³⁰ Briskin and Muller (n 104).

¹³¹ E Heery, 'Equality Bargaining: Where, Who, Why?' (2006) 13 *Gender, Work and Organization* 522, 533. See also T Colling and L Dickens, *Equality Bargaining – Why Not?* (Equal Opportunities Commission 1989) 29-34; R Hyman, 'Changing trade union identities and strategies' in R Hyman and A Ferner (eds), *New Frontiers in European Industrial Relations* (Blackwell 1994); L Dickens, 'Gender, race and employment equality in Britain: inadequate strategies and the role of industrial relations actors' (2003) 28 *Industrial Relations Journal* 282, 287.

¹³² At this respect, see G Kirton and A Greene, 'The dynamics of positive action in UK trade unions: the case of women and black members' (2002) 33 *Industrial Relations Journal* 157, 166-167.

¹³³ Labour Research, 'BME leadership: how are UK unions faring?' (October 2012) <<http://www.lrdpublications.org.uk/publications.php?pub=LR&iss=1631&id=id132571>> accessed 15 April 2014.

minorities membership in trade unions is low in both countries, it seems to be higher in Britain, where 8% of trade union members have non-white ethnic backgrounds,¹³⁴ whilst foreigners account only 4% of Comisiones Obreras (CCOO) members, one of the two major Spanish trade unions.¹³⁵ Accordingly, a critical mass is more likely to emerge in Britain, and arguably, it is also more probable to find ethnic minorities' officers involved in collective bargaining. For instance, in a 2012 survey among British trade unions, 43% reported that 'at least one of their full-time national negotiating officials (excluding race equality officers) is a BME official', a rise of 13% compared to 2009.¹³⁶ Furthermore, British unions are also more active in developing strategies to promote internal race equality and to encourage BME participation. In the 1980s they already adopted the Black Workers' Charter¹³⁷ and race-equality committees currently exist in many unions.¹³⁸ Nevertheless, commentators have also warned that these committees may not have any impact on equality bargaining if they only have an advisory status¹³⁹ and they do not have links with bargaining structures.¹⁴⁰

Heery suggests that it is not only officers' identity that matters but also their personal commitment to promoting equality through collective bargaining. It thus seems important to develop *internal equality cultures* within unions and to educate union officers. As Kirton and Greene point 'workplace representatives need to be educated. [T]he vast majority are white, male and middle aged and they just would not know [...] how to bargain around race equality issues'.¹⁴¹ In this respect, whilst most Spanish trade unions train their members on the

¹³⁴ BIS, *Trade Union Membership 2012. Statistical Bulletin* (BIS 2013) Table 3.1.

¹³⁵ C González Enríquez, *Los Sindicatos ante la Inmigración* (Observatorio Permanente de la Inmigración 2008) 101. See also H D Köhler and J P Calleja Jiménez, 'Los determinantes de la afiliación sindical en España' in *Observatorio Confederal de Afiliación* (Fundación 1º de Mayo 2011) 36, 43. Data broken down by ethnicity are not available in Spain, so data broken down by nationality are used instead.

¹³⁶ Labour Research (n 133).

¹³⁷ Runnymede Trust, 'The Struggle for Race Equality' <www.runnymedetrust.org/histories/race-equality/86/trade-union-charter-for-black-workers.html> accessed 10 May 2014.

¹³⁸ *ibid* 162-164.

¹³⁹ Kirton and Greene (n 132) 164.

¹⁴⁰ L Dickens, 'Collective bargaining and the promotion of gender equality at work: opportunities and challenges for trade unions' (2000) 6(2) *Transfer* 193, 204.

¹⁴¹ Kirton and Greene (n 132) 168.

negotiation of *gender* equality clauses,¹⁴² internal trainings on racism and ethnic minorities are more limited.¹⁴³ Conversely, British unions are ahead in policies and education to promote *racial* equality. For instance, the TUC regularly holds training events on racism¹⁴⁴ and Unison has developed an Equality Scheme –with explicit references to racial equality– to promote a representative union structure and foster the insertion of equality clauses in collective agreements.¹⁴⁵

Finally, it is important to analyse whether all these elements are encouraging the introduction of effective *equality clauses* or purely formal declarations.¹⁴⁶ In Britain, in a TUC survey, 42% of respondent trade unions had managed to negotiate clauses concerning BME workers in 2011, a rise of 20% compared to the 2009 Audit.¹⁴⁷ In Spain, there are no official quantitative data, but regional statistics indicate that almost 59% of the agreements signed in Andalusia in 2010 included gender equality clauses.¹⁴⁸ Nevertheless, the most common type of clauses in both countries are those which express a general – formal– commitment towards equality. For instance, in Britain, most agreements concerning BME workers are declarations for ‘dealing with racism and the far right in the workplace’.¹⁴⁹ In Spain, most Equality Plans introduce general statements which have little practical consequence, and many clauses just reproduce the legal provisions.¹⁵⁰ For instance, among the sectoral agreements which included equality clauses in 2011, only 13% developed specific criteria or

¹⁴² See UGT, ‘La UGT imparte a sus delegados un curso sobre ‘Negociación en Igualdad’ (30 October 2013) <<http://navarra.ugt.org/mujer/noticias/imparte-delegados-curso-sobre-negociacion-7654.html>>; CCOO, ‘Curso de negociación colectiva y políticas de igualdad’ (28 June 2013) <www.fsc.ccoo.es/webfsc/Actualidad:Federal:Actualidad:505179--Curso_de_negociacion_colectiva_y_politicas_de_igualdad> both accessed 10 May 2014.

¹⁴³ See one of the few examples in UGT-FETE, ‘Cursos: multiculturalidad e interculturalidad’ (11 February 2014) <www.fetemadrid.es/areas/igualdad/cursos/> accessed 10 May 2014.

¹⁴⁴ TUC, ‘Union learn. Equality and Diversity’ <www.unionlearn.org.uk/taxonomy/term/47> accessed 10 May 2014.

¹⁴⁵ See Unison, *A guide to Equality in Unison* (Unison 2012) 10-16.

¹⁴⁶ Note, however, that British collective agreements are not publicly available, whilst in Spain, many are published in the official journal or trade unions’ websites. Since 2010, there is also an official registry which signposts collective agreements with equality clauses and equality plans, see RD 713/2010, de 28 de mayo, sobre registro y depósito de convenios y acuerdos colectivos de trabajo.

¹⁴⁷ TUC, *Equality Audit* (n 113) 5.

¹⁴⁸ ‘Casi el 59% de los convenios colectivos andaluces incluyen cláusulas de no discriminación por razón de género’, *Diario de Sevilla* (Sevilla 5 October 2010).

¹⁴⁹ TUC, *Equality Audit* (n 113) 19.

¹⁵⁰ UGT, ‘Resumen del análisis de los convenios colectivos’ (2011) 15, 18 <http://www.ugt.es/actualidad/2011/mayo/jor-resumen_de_conclusiones.pdf> accessed 14 April 2014.

guidance to be implemented at company level.¹⁵¹ In fact, some unions have even refused to sign equality plans because they considered that they were a mere 'declaration of intent'.¹⁵² Consequently, whilst many clauses may have a symbolic and pedagogic value to *raise awareness* against discrimination,¹⁵³ their potential to *actually prevent* discrimination and tackle disadvantage seems rather limited.

Still, whilst real measures are scarce in both jurisdictions, they are somewhat more abundant in Britain, especially concerning BME workers. In 2010, at least five British unions agreed with employers positive action measures to address BME underrepresentation.¹⁵⁴ For instance, through a positive action policy, the trade union Prospect together with Northern Power Grid managed to increase ethnic diversity in recruitment at graduate and HNC levels. Similarly, thanks to trade union pressure, Tesco has developed a policy to increase the presence of Asian and black members in collective bargaining structures.¹⁵⁵ In contrast, in Spain, positive action measures are rarely adopted,¹⁵⁶ and when they are, they mainly concern gender, as Spanish legislation specifically encourages the negotiation of positive action measures to offset *women's* underrepresentation.¹⁵⁷ However, even in Britain, gender equality clauses stand out as the area where equality bargaining is more successful.¹⁵⁸

On the whole, it could seem that the Spanish collective bargaining system has more chance of leading to the inclusion of policies to prevent discrimination in collective agreements. Indeed, there is more institutional support and social partners have a procedural obligation to negotiate such clauses, but the obligation concerns exclusively gender equality. Whilst gender clauses have been recognised to have positive effects on the development of anti-racist clauses, British policies introduced through collective agreements are more often directed at BME workers than they are in Spain, which could be due to the higher

¹⁵¹ Sanz Bernal (n 109) 42.

¹⁵² UGT, *Participación sindical en las empresas del Ibex 35* (UGT 2012) 109.

¹⁵³ Carrasquer Oto (n 116).

¹⁵⁴ TUC, *Equality Audit* (n 113) 19.

¹⁵⁵ *ibid* 20.

¹⁵⁶ UGT, 'Resumen del análisis...' (n 150).

¹⁵⁷ Art 17(4) ETT.

¹⁵⁸ TUC, *Equality Audit* (n 113) 4, 11.

BME representation within unions and to the greater awareness about racial institutional discrimination in British Semi-Autonomous Social Fields (SASFs).¹⁵⁹

7.3.2.2 *Businesses' initiatives: how to close the gap between rhetoric and practice and achieve lasting commitments?*

Finally, this section seeks to analyse to what extent businesses are ready to develop equality policies when they are not compelled to do so. For that purpose, I will first shortly compare businesses' motivations for developing ex-ante equality and diversity policies, and I will then analyse what type of measures are more popular and whether external incentives may encourage effective policies.

Drivers for equality and diversity policies

Companies are obviously not homogeneous; they may have different attributes which can affect the way they operate and their internal policies. In particular, their size is a key factor for the development of equality and diversity policies. According to an EU wide study, fewer SMEs tend to have diversity policies (48%) than large (56%) or very large companies (76%).¹⁶⁰ Many SMEs do recognise the benefits of diversity, but they are less likely to establish formal diversity policies¹⁶¹ because they have more limited resources and they lack specialised departments.¹⁶² On the other hand, SMEs managers seem to think that their size allows them to be more flexible to deal with diversity issues informally.¹⁶³

¹⁵⁹ See s 2.3.2 and Chapter 4, text to n 33-35.

¹⁶⁰ Focus Consultancy, *Diversity Management in 2008: Research within the European Business Test Panel* (Commission (EC) 2008) 11.

¹⁶¹ Focus Consultancy, *Diversity for Talent and Competitiveness: The SME Business Case for Diversity* (Commission (EC) 2008) 4.

¹⁶² Interviews with Employment policy department at Confederation of British Industry ('CBI') (London, UK, 15 July 2013) and José Ignacio Torres Marco, Employment policy officer at Confederación de Pequeñas y Medianas Empresas ('CEPYME') (Madrid, Spain, 13 November 2013). A study conducted by CIPD in the UK also showed that SMEs are less 'sophisticated' in their diversity policies than large organisations, see *Diversity in business. A focus for progress* (CIPD 2007) 5.

¹⁶³ G Kirton and I Read, 'Inequalities in Europe's SMEs: the challenges for a trade union agenda' (2007) 13 *Transfer* 131, 135, 141; Focus Consultancy, *Turning diversity into talent and competitiveness for SMEs* (Commission (EC) 2008) 15.

In Britain and Spain SMEs account for 99% of private companies¹⁶⁴ and they employ around 59%¹⁶⁵ of private sector workers. According to empirical studies both British and Spanish SMEs tend to adapt to their workforce needs, so it is only when diversity issues arise, that they spontaneously try to find a solution,¹⁶⁶ which sometimes later materialises in a formal policy. So the lack of SMEs formal equality policies¹⁶⁷ does not necessarily equate to a lack of measures, but generally, there is a 'lack of commitment to promoting equality *for its own sake*'.¹⁶⁸ Conversely, large British and Spanish companies tend to embed diversity in their corporate culture, but this does not always translate into effective policies.¹⁶⁹ Hence, whilst SMEs may need external incentives to develop ex-ante equality measures to tackle disadvantage, large companies may need different incentives to encourage *effective* equality measures.¹⁷⁰

Overall, notwithstanding that workers' ethnic diversity in Britain and in Spain is comparable,¹⁷¹ Spanish companies tend to put less efforts in ethnic diversity policies than British ones. Indeed, only 14% of Spanish respondents to the 2012 Eurobarometer considered that enough was being done to promote ethnic diversity at their workplace, whilst 31% of UK respondents did.¹⁷² Interestingly, whilst support for workplace policies to promote diversity is

¹⁶⁴ BIS, *Business population estimates for the UK and regions 2013* (23 October 2013); INE, 'Directorio Central de Empresas. Empresas por estrato de asalariados y condición jurídica' (2013) <<http://www.ine.es/dynt3/inebase/es/index.htm?padre=51&dh=1>> accessed 2 February 2014.

¹⁶⁵ BIS, *Business population*, *ibid*; UGT, *Iniciativas de Responsabilidad Social de las Empresas en el Ámbito de las PYMES* (Observatorio RSE-UGT 2012) 10.

¹⁶⁶ Pajares and others (n 122) 115; Kirton and Green (n 132) 137-141.

¹⁶⁷ In the UK only 17% of SMEs have formal diversity strategies, whilst around 50% of public sector employers and large companies have them, B van Wanrooy and others, *The 2011 Workplace Employment Relations Study. First Findings* (BIS 2011).

¹⁶⁸ Kirton and Read (n 163) 141 (emphasis added).

¹⁶⁹ K Hoque and M Noon, 'Equal opportunities policy and practice in Britain: evaluating the "empty shell" hypothesis' (2004) 18 *Work, Employment & Society* 481; D Dean, 'Diversity Management in the Private Sector' in A Greene and G Kirton (eds), *Diversity management: Organizational and stakeholder experiences* (Routledge research in employment relations vol 21, Routledge 2009) 92; Pajares and others (n 122) 115.

¹⁷⁰ Within large companies, British ones have been found to be at the forefront of European corporations in the development of diversity policies, whilst Spanish ones seem less prone to it; V Singh and S Point, 'Strategic Responses by European Companies to the Diversity Challenge: an Online Comparison' (2004) 37(4) *Long Range Planning* 295, 300-301; cf M Ventosa García-Morato, 'Gestión de la Diversidad Cultural en las empresas' (Fundación Diversidad/Fundación Bertelsman 2012) 20.

¹⁷¹ See Figure 2.

¹⁷² TNS Opinion & Social, *Special Eurobarometer 393. Discrimination in the EU in 2012* (Commission (EU) 2012) T56.

somewhat higher in Spain,¹⁷³ skin colour and ethnic origin have been more widely recognised to be a potential disadvantage for candidates in Spain (40%) than in Britain (22%).¹⁷⁴

These differences may be due to several reasons. Cultural and social factors have been shown to have an influence on diversity policies.¹⁷⁵ Hence, the fact that Spaniards have less sensitivity towards race than towards other discrimination grounds¹⁷⁶ may have a negative impact on business policies. Another motive may be the larger historical tradition of anti-discrimination legislation and racial equality bodies in Britain,¹⁷⁷ compared to its recent development in Spain.¹⁷⁸ Furthermore, unlike British gender and racial equality legislation, which developed at a similar pace, in Spain, gender equality law has always been ahead,¹⁷⁹ and it was not even overtaken with the implementation of the RED due to its 'veiled' transposition and its limited dissemination.¹⁸⁰

These different socio-historical backgrounds may also partly explain why British and Spanish companies have different drivers to develop ethnic diversity policies. Whilst legal pressures are mentioned as the first reason among British companies, in Spain the main driver is Corporate Social Responsibility ('CSR'), and legal pressures are only the fourth reason (see Table 4). This may also be linked to the fact that litigation rates are higher in Britain than in Spain,¹⁸¹ so businesses need to make sure they effectively comply with their legal obligations

¹⁷³ *ibid*, T40.

¹⁷⁴ Annex 10, Figure 9.

¹⁷⁵ See E Bellard and C C Rüling, 'Importing diversity management: corporate discourses in France and Germany' (Ecole des Hautes Etudes Commerciales, Université de Genève 2001); S Point and V Singh, 'Defining and dimensionalising diversity: evidence from corporate websites across Europe' (2003) 6 *European Management Journal* 750-761, both cited in Focus Consultancy, 'Voluntary Diversity Initiatives in and for Europe: The Role of Diversity Charters' <ec.europa.eu/social/BlobServlet?docId=774&langId=en> accessed 8 June 2014, 11-12.

¹⁷⁶ See I Rodríguez, '¿Cuáles son los agravantes en el plano jurídico y en el plano práctico que se dan en la discriminación étnica y de raza?' in F Rey Martínez (coord), *III Foro Tercer Sector. Igualdad de trato, de oportunidades y Tercer Sector* (Fundación Luis Vives 2007) 153-154.

¹⁷⁷ cf Singh and Point (n 170); L Cachón, 'Desde la perspectiva europea, ¿Qué países son los más activos en los enfoques de igualdad de trato y qué modelos son extrapolables al caso español?' in Rey Martínez, *ibid* 111.

¹⁷⁸ See Ch 3.

¹⁷⁹ See a similar opinion in Rodríguez (n 176) 154; this opinion was also expressed by Torres (n 162).

¹⁸⁰ See eg L Cachón, 'España y la Directiva 2000/43: de la "ocasión perdida" a una legislación general sobre igualdad de trato' [2004] *Tiempo de Paz* 73: 13-22; ECRI, Report on Spain. Fourth monitoring cycle' (2010) CRI(2011)4; see also Ch 4.

¹⁸¹ Interview with Katrina Belsué Guillorme, Helpdesk Manager, Sos Racismo Aragón (Zaragoza, Spain, 29 April 2013).

to avoid future litigation costs.¹⁸² According to the CBI, British companies take ‘quite seriously’ equality law and diversity policies because, among other reasons, litigation may cost them ‘thousands and thousands of pounds’.¹⁸³ Finally, positive equality duties may also exert some ‘legal pressure’ because they may stimulate private companies to adopt formal equality and diversity policies to increase their chances to gain contracts with the public sector.¹⁸⁴

Table 4. Drivers for businesses’ diversity policies in Britain and Spain by order of importance, from 1 (most important) to 5 (least important).

Drivers	Britain	Spain
Legal pressures	1	4
CSR, culture, values	3	1
Strategic need	---	2
Business interest; it makes business sense	4	3
Human Resources reasons (retaining and attracting talent; commitment towards employees)	2	5
Because it is morally right	5	---

Source: CIPD (2007) and Fundación Diversidad and Norman Broadbent (2013).

Note: British data are drawn from a sample of 285 companies from all sizes; whilst the Spanish data are derive from a sample of 64 companies of more than 200 employees.

Several sources also suggest that British and Spanish companies are more willing to make efforts to attract ethnically diverse employees when this can help opening new markets or attracting customers.¹⁸⁵ For instance, the Head of Group Equality & Diversity at Lloyds Tsb stated: ‘[w]hen diverse customer groups see themselves mirrored in our workforce they’re more likely to do business with us. We’ve seen this happen particularly with our race programme. This demonstrates that diversity isn’t a ‘nice thing to do’ – it’s a source of competitive

¹⁸² CIPD (n 162) 6.

¹⁸³ The CBI also suggested that anti-discrimination legislation may have been ‘utilised by people who perhaps have not been discriminated against’ to get higher compensation awards (n 162).

¹⁸⁴ Dean (n 169) 103-104. Whilst the duties do not normally apply to private bodies, they may apply to some public authorities’ contractors.

¹⁸⁵ EHRC, TUC and CBI, *Talent not Tokenism: the Business Benefits of Workforce Diversity* (CBI 2008) 24-27.

advantage.¹⁸⁶ Similarly, in Spain service stations have hired Moroccans to attract customers from a similar cultural background and construction companies have engaged Eastern Europeans to open new markets in their respective countries.¹⁸⁷ However, these apparently positive diversity policies raise at least two concerns: (1) they can dangerously foster stereotypes, and (2) they seek to promote business benefits, rather than promoting equality, so although on the face of it they ensure compliance, in practice they may 'carry only a modest benefit for the workers they are ostensibly meant to benefit'.¹⁸⁸ Furthermore, policies linked to business' benefits may be very vulnerable to market changes (ie the economic crisis) and may thus be more volatile. However, British companies' diversity policies may be less sensitive to market changes because they are not only connected to profits, but also to legal pressures and to the willingness of attracting people.¹⁸⁹

Businesses' policies

A general concern about British and Spanish diversity policies is that companies have retained a formal concept of equality and thus believe that equal treatment means treating everyone alike.¹⁹⁰ Under this assumption a 'top-down approach to policy formulation and implementation is unproblematic, and there is no need to involve trade unions or employees directly or explore the responsibilities of organizational structure in sustaining inequalities'.¹⁹¹ This may explain why formal diversity policies are rarely translated into real actions.¹⁹² According to 2011 data, 'the vast majority' of British workplaces (more than 75%) did not take any *action* to combat discrimination.¹⁹³ In Spain,

¹⁸⁶ *ibid* 24.

¹⁸⁷ Interview Torres (n 162).

¹⁸⁸ E Heery, 'Debating employment law: responses to juridification' in P Blyton, E Heery and P Turnbull (eds), *Reassessing the Employment Relationship* (Palgrave 2011) 71, 82.

¹⁸⁹ Hoque and Noon have demonstrated the connection between companies' reasons for introducing diversity policies with their practical relevance (n 169) 481-506.

¹⁹⁰ L Dickens, 'The road is long: thirty years of equality legislation in Britain' (2007) 35 *British Journal of Industrial Relations* 463, 473; M Ventosa García-Morato, 'Gestión de la Diversidad Cultural en las empresas' (Fundación Diversidad/Fundación Bertelsman 2012). This may be linked to the fact that 'half of people who do the [equality policies] don't know much about it', Sullivan (n 110).

¹⁹¹ Dean (n 169) 113-114.

¹⁹² *ibid* 92.

¹⁹³ van Wanrooy and others (n 167) 35.

whilst 89% of the larger listed companies had adopted gender equality plans in 2011, only 34% had policies to address 'cultural diversity'.¹⁹⁴

Some reports point out that both British and Spanish companies do take some measures as regards recruitment and selection procedures,¹⁹⁵ but it is unclear whether they go beyond simply monitoring.¹⁹⁶ Indeed, other data suggest that the most popular measures are the least interventionist ones. For instance, in a survey conducted among UK companies, 66% of respondents conducted awareness training and 62% had employee attitude surveys, whilst only 16% had set diversity goals in managers' performance targets and 20% applied diversity standards.¹⁹⁷ That is also the case in Spain, where most measures simply consist of including diversity in the CSR plans (55%) or of providing training (45%).¹⁹⁸ Dean argues that this gap between rhetoric and practice may be due to an 'unreflective acceptance of the status quo' and 'limited awareness of the complexities of equality and diversity issues'.¹⁹⁹ For instance, managers may not be aware that the workplace culture may be one of the reasons why ethnic minorities are underrepresented in management positions. Indeed, this lack of understanding can be sensed in the following statement of Torres Marco (from the Spanish Confederation of SMEs, CEPYME):

Companies do not *consciously* discriminate. [...] I believe that instead of talking about companies, we should talk about *personal and individual factors*. [...] It is true that sometimes the country of origin may be the source of social prejudices, but this is more a *cultural issue* than a conscious behaviour.²⁰⁰

Concerning positive action, soft measures for disadvantaged ethnic minorities are allowed in both countries²⁰¹ provided actions are proportionate

¹⁹⁴ UGT, *Participación sindical* (n 152) 31.

¹⁹⁵ van Wanrooy and others (n 167); Fundación Diversidad and Norman Broadbent, 'Gestión Global de la Diversidad Cultural' (2013) <http://www.fundaciondiversidad.org/descargas/informe_gestion_diversidad_cultural/Informe_Gestion_Diversidad_Cultural.pdf> accessed 1 May 2014, 22.

¹⁹⁶ The CBI (n 162) provided some examples of active recruitment policies to attract women, but not to attract ethnic minorities.

¹⁹⁷ CIPD (n 162) 11.

¹⁹⁸ Fundación Diversidad and Norman Broadbent (n 195) 22.

¹⁹⁹ Dean's case study based on ServiceCo showed that many line managers did not understand the concept of 'diversity' and did not link it to 'equality' (n 169) 112.

²⁰⁰ Interview with Torres (n 162).

²⁰¹ EqA 2010, ss 158- 159; Ley 62/2003, art 35.

and candidates are equally qualified.²⁰² However, one of the main barriers for the adoption of positive action is the lack of data on the composition of the workforce in terms of ethnic diversity.²⁰³ Diversity monitoring is not extensive in the British private sector, but a survey among 145 UK companies showed that more than 32% did monitor demographic representation by groups.²⁰⁴ In contrast, Spanish organisations very rarely collect data on the ethnic diversity of their workforce. Hence, it is unsurprising that positive action targeting ethnic minorities is rare in both countries. In fact, Britain workplaces with special procedures to attract job applicants from ethnic minorities have decreased since 2004 from 8% to 5%,²⁰⁵ but nevertheless, they are more widespread than in Spain,²⁰⁶ where they are almost non-existent.

External incentives

To encourage the development of formal equality policies or to reduce the gap between diversity discourses and effective measures, different types of external incentives can be developed. A first type are benchmarking and labelling systems which flag companies which respect diversity principles or policies. In Spain there are two schemes which concern all discrimination grounds. The first one is the campaign 'informate y actúa' and the labelling scheme 'no+discriminación', launched in 2006 by CEAR, an NGO working with migrants and refugees. It is promoted through a website which includes several publications, guidance and best practice examples. The second one is the Spanish Diversity Charter, managed by *Fundación Diversidad* with the support of the European Commission. The Charter has been signed by more than 600 companies

²⁰² In addition, in the UK, positive action needs to target persons who suffer a disadvantage or have special needs connected to a protected characteristic, or groups of people who are 'disproportionally' underrepresented due to the protected characteristic, see EqA 2010, ss 158-159. In Spain, these requirements have developed through disability and gender equality case law, see ege SSTC 103/1983 de 22 noviembre; 128/1987 de 16 julio; 216/1991 de 14 noviembre; 229/1992 de 14 diciembre; 269/1994 de 3 octubre

²⁰³ T Makkonen, *European handbook on Equality Data* (Commission (EC) 2007) 11; C McCrudden, 'Equality Legislation and Reflexive Regulation: a Response to the Discrimination Law Review's Consultative Paper' (2007) 36 ILJ 255, 265.

²⁰⁴ Bernard Hodes Group, *Diversity & Inclusion – Fringe or Fundamental?* (CIPD 2012) 13.

²⁰⁵ van Wanrooy and others (n 167) 35.

²⁰⁶ See eg M Beckford and N Midgley, 'Half of recruits to BBC's trainee scheme are from ethnic minorities' *Telegraph* (London, 3 June 2010)

<<http://www.telegraph.co.uk/culture/tvandradio/7798083/Half-of-recruits-to-BBCs-trainee-scheme-are-from-ethnic-minorities.html>> accessed 27 May 2014.

of all sizes, which ascribe the ten diversity principles therein included. Whilst most of the principles are quite vague, some do invite to take action, for instance, promoting awareness rising among employees, encouraging recruitment of a diverse workforce and fostering its effective integration within the organisation. However, Torres Marco considers that the potential of these systems in Spain is limited because they lack public recognition and they are not promoted enough; most companies do not know them –especially SMEs– or do not see the advantage of joining them.²⁰⁷ Furthermore, whilst they may be an easy way of introducing diversity policies in companies with little or no experience in the field, they do not guarantee that the diversity principles will be actually implemented because there is no formal assessment.²⁰⁸ In Britain, the main benchmarking scheme addressing ethnic diversity is the ‘Race for Opportunities Awards’, which was launched by Business in the Community (‘BITC’). It seeks candidatures from employers on a yearly basis, and subsequently lists the best ten private sector and public sector employers in terms of racial equality policies.²⁰⁹ Although both the Spanish and BITC schemes try to promote best practices, the latter put more emphasis on showcasing the best *employers* in terms of racial diversity policies,²¹⁰ which may be a way to influence businesses’ vision of diversity policies and the motives for implementing them.

Secondly, institutional programmes and legislation may also encourage *private* organisations to develop ethnic diversity policies. However, whilst institutional programmes exist in Britain and Spain, most do not target companies, but rather ethnic minorities. For instance, both countries have adopted national strategies to promote the integration of Roma which contain valuable actions targeting the Roma population,²¹¹ but they lack initiatives to

²⁰⁷ Interview with Torres (n 162).

²⁰⁸ Focus Consultancy, ‘Voluntary Diversity Initiatives’ (n 175) 7.

²⁰⁹ See ‘Race for Opportunity Awards’

<<http://raceforopportunity.bitc.org.uk/benchmarkingawards/benchmarkingtopten2013>> accessed 21 May 2014.

²¹⁰ This was also mentioned as an important factor by the CBI (n 162).

²¹¹ ‘National Roma Integration Strategy in Spain 2012-2020’

<http://ec.europa.eu/justice/discrimination/files/roma_spain_strategy_en.pdf> accessed 20 January 2014; Council (EU), Conclusions on an EU Framework Strategy for Roma Integration up to 2020: United Kingdom of Great Britain and Northern Ireland (Brussels, 19 May 2011). See also Department for Work and Pensions, *Increasing employment rates for ethnic minorities* (House of Commons 2008) 2.25-2.29.

encourage companies to hire qualified Roma. Yet, in Britain it is generally acknowledged that ‘up to a half of the overall gap between the ethnic minority employment rate and the overall employment rate is attributable to discrimination’,²¹² which highlights the importance of directing institutional efforts also at companies. Nevertheless, in Spain some NGOs are taking a key mediating role for the recruitment of Roma and migrants in private sector organisations, especially within SMEs. Fundación Secretariado Gitano (FSG) has been running the programme *Acceder* since 1999. Apart from providing counselling and training to Roma, they go door-to-door to build trust with local companies, to persuade them to hire their trainees and to mediate when they encounter prejudices. Through this system they have established partnerships with more than 1000 companies.²¹³ Whilst such a far-reaching programme does not exist in Britain, it seems that Jobcentre Plus is also proactively encouraging ‘employers to widen their recruitment pools and their recruitment practices’,²¹⁴ especially in areas with high ethnic minority density.²¹⁵

Last but not least, as pointed out earlier, SMEs may need more external incentives to adopt *ex ante* diversity policies. To address these needs, the Spanish Ministry for Health, Social Services and Equality has a funding programme for SMEs willing to develop equality plans and an online support and contact platform which provides technical assistance.²¹⁶ It is mainly aimed at gender, but to some extent, it can have positive spill over effects on other grounds. Yet, in quantitative terms the reach of this funding programme is obviously limited: in 2013, there were less than 140 beneficiaries.²¹⁷ In Britain, there are also schemes targeting SMEs, like ‘Diversity Works for London’, which used to provide online resources, case studies and guidance for over 6000 registered businesses.²¹⁸

²¹² Department for Work and Pensions, *ibid*, Committee of Public Accounts, Question 11.

²¹³ Commission (EU), ‘Roma Stories. Spain - A fresh view of job creation’ <http://ec.europa.eu/justice/discrimination/files/roma_stories_2013/spain_en.pdf> accessed 2 March 2014.

²¹⁴ Department for Work and Pensions (n 211) Committee of Public Accounts, Question 13.

²¹⁵ For instance, the Leicester branch organized ‘cultural tours for employers’, *ibid* 25.

²¹⁶ Ministerio de Sanidad, Servicios Sociales e Igualdad, ‘Servicio de Asesoramiento’ <<http://www.igualdadnlaempresa.es/>> accessed 20 June 2014.

²¹⁷ Ministerio de Sanidad, Servicios Sociales e Igualdad, Resolución de 10 de diciembre de 2013 [BOE 27/12/2013].

²¹⁸ London SME Working Group, ‘Brief on Diversity Works for London’ <<http://www.london.gov.uk/moderngov/documents/s26280/Item%209A%20->

However, whilst the potential public of these online platforms is very large, many SMEs which are not interested in diversity policies *per se* may not use them if there is not an appealing reason to attract them in the first place.

Overall, whilst some British and Spanish employers have formally committed to develop equality policies, they seem to have misleading conceptions on how to promote equality in practice and their policies are often driven by profits, which limits their potential to have long-lasting effects. However, British businesses seem slightly more likely to develop effective equality policies to avoid the costs of facing potential legal action and to be publicly recognised as desirable employers.

7.4 Conclusion

Chapters 5 and 6 suggested that addressing discrimination ex-post has several shortcomings because litigation and Alternative Dispute Resolution (ADR) mechanisms are not always suited to the particularities of discrimination disputes. In addition, even if victims receive some type of redress, they may not be put in the situation they were before being discriminated against. Consequently, ex-ante strategies to prevent racial discrimination and promote equal opportunities are in principle preferable to ex-post strategies.

The purpose of this chapter was analysing how other strategies, namely, employers' policies derived from equality duties, collective bargaining and voluntary initiatives, can contribute to increasing the ex-ante effectiveness of racial equality legislation and policies. The comparison between Britain and Spain pointed that the Spanish positive duty is more action based, and institutional support for inserting equality clauses in collective agreements is higher, but in practice, as regards racial equality, they cannot be considered to be more effective than the British counterparts. Also, businesses' voluntary initiatives tend to be more effective in Britain, where employers use them as a tool to attract and retain the workforce and to prevent discrimination in view of avoiding the costs of litigation.

[%20Brief%20on%20Diversity%20Works%20for%20London%20DWFL.pdf](#)> accessed 21 May 2014.

On the whole, this chapter has shown how difficult it is to get employers to develop *effective* equality policies. From the regulatory and voluntary strategies analysed, it seems that collective bargaining could potentially be the most effective one because ‘a policy depends only on management, whereas a collective agreement is an *agreement* between both sides, management and trade unions’.²¹⁹ Employers cannot unilaterally change collective agreements as they wish and trade unions can put pressure on employers to go beyond formal equality declarations and fulfil the agreed commitments. Yet, for that purpose, developing an equality culture and representative structures within unions is necessary in the first place.²²⁰ Furthermore, the comparative study has also pointed out the crucial role that the legislative and institutional framework play in strengthening collective bargaining. For instance, whilst both British and Spanish collective bargaining are experiencing difficulties due to the economic crisis, the Spanish legal framework is aiding the insertion of equality clauses through the procedural duty to negotiate equality plans and thanks to the persistence of sectoral collective agreements. At the same time, however, the longstanding British legislation in the field and greater social awareness about racial discrimination seems to be a key factor for British businesses’ greater commitment towards ethnic diversity policies.

Overall, businesses’ willingness to develop racial equality policies seems to be a *necessary* factor to trigger effective *ex-ante* equality policies, but it is generally not *sufficient*. This can be explained on the basis of at least three grounds: (1) businesses may not be interested in equality policies until they need to handle diversity issues within their workforce, especially SMEs; (2) even when they are willing to develop equality policies, they are often unfamiliar with complex equality concepts, like institutional discrimination and unconscious bias; and (3) many businesses’ equality policies are fragile because they are based on a purely economic rationale. Therefore, employers’ equality policies should be institutionally supported, or even better, encouraged through external stimuli, and especially through regulation. Indeed, paradoxically, enforcement

²¹⁹ Sullivan (n 110) (author’s italics).

²²⁰ Otherwise, collective bargaining can also be the source of discrimination, see eg STC 149/1991, de 1 julio; *GMB v Allen* [2008] EWCA Civ 810 (CA).

mechanisms seem to be a vital tool to enhance ex-ante effectiveness of employer's equality policies. For instance, the lack of British and Spanish bodies with authoritative powers to monitor performance as regards the equality duties has lead public authorities to take compliance too lightly. And the same conclusion can be derived from the reverse example, namely, the fact that British businesses' fear of employees' potential judicial actions has boosted their interest in diversity policies.

Yet, whilst regulation is *necessary*, it is equally unlikely to yield effective equality policies on its own. The analysis of regulatory initiatives has shown that even when positive equality duties are action based and goal oriented, like in Spain, they can yield limited results if the public authority bound by the duty and its workforce are not truly *committed* to it. The Spanish gender equality duty seems stronger on the paper than the British generic and specific duties, but in its implementation Spanish public authorities have failed to design coherent equality plans and to regularly involve the workforce.

Finally, regulation can have a non-negligible pedagogic value. Interestingly, the Spanish Gender Equality Law is playing a decisive role in raising businesses' awareness of equality law, and is triggering the extension of gender equality policies to other protected grounds, including race and ethnic origin. But as long as Spanish SASFs (ie communities of social values) continue to have low awareness about racial discrimination, and social recognition for racial equality policies continues to be low, the take up of employers' policies will be arguably limited.²²¹

²²¹ In addition, it is questionable whether, without further social support for racial equality policies, legislation enacted in the field of gender would be ever extended to racial or ethnic origin discrimination.

Chapter 8. Conclusions

8.1 Research questions

This thesis has examined whether the RED has prompted the development of effective race equality legislation and policies in Britain and Spain, and which factors can be determinant for improving the effectiveness of the latter. In this regard, I have attempted to answer the following research questions:

1. Has the Racial Equality Directive triggered effective legislation and policies to address racial discrimination in Britain and Spain? And more specifically: Is the Racial Equality Directive *enough* to trigger effective legislation and policies on *its own*? If not, which factors and actors influence the effectiveness of the application of racial equality legislation and policies in Britain and Spain?
2. How can the effectiveness of racial equality legislation and policies be improved at national level?

To properly address the research questions, I first had to consider whether the RED was only meant to be a symbolic statement against racism or, in addition, was conceived to have practical effects, and in the latter case, what should be understood by 'effective'. In this respect, article 1 of the RED clearly states that its ultimate aim is *putting into effect* the principle of equal treatment. But when can we consider that the principle of equal treatment is being applied '*effectively*'? My definition of effectiveness is based on Griffiths' theory on the Social Working of Law, which assumes that individuals belong to Semi-Autonomous Social Fields ('SASFs'): communities with their own rules and values, which inevitably have an impact on their members' rule-following, but are nevertheless sensitive to external stimuli (ie legislation). Having this concept in mind, Griffiths differentiates between (1) informal and spontaneous uses of rules between individuals, (2) uses of rules within organisations, and (3) formal uses of rules, through ADR and litigation. Ideally, rule-following should be high at informal and organisational levels so that discrimination is prevented (ex-ante), instead of being dealt with ex-post through formal uses of rules. However, given that totally eradicating racism seems not feasible, for the purposes of this

investigation, racial equality laws and policies are considered effective when they can: (1) *prevent* discrimination by removing obstacles and empowering ethnic minorities –‘*ex-ante effectiveness*’– and (2) the consequences of discrimination are dealt with in a way which *minimises* moral, financial and time costs –‘*ex-post effectiveness*’.

8.2 *Has the RED triggered effective legislation and policies in Britain and Spain?*

Having defined the concept of effectiveness and the analytical framework in Chapter 2, I looked at whether the RED can, *on its own*, trigger effective legislation and policies at national level, which must be answered in the negative. Whilst it is true that, in the late 1990s and early 2000s, the RED sent a strong symbolic message against racism by harmonising substantive definitions of discrimination, it also had –at least in theory– the aspiration of putting into effect the principle of equal treatment. Yet, Chapter 3 has shown that its enforcement provisions have important limitations, which make it almost impossible for the RED to be a real driver of social change *on its own*, for two main reasons. First, the RED strongly relies on individual and corrective justice, so nearly all the implementation measures that MS had to take concerned situations where discrimination has *already* taken place. So in most MS the central mechanism to address discrimination are individual complaints, but the legal machinery to do so can almost only be activated *by the victim herself*, who tends to be in a weaker position, often leading to social lumping (ie victims’ inaction).

Second, most of the enforcement provisions, and especially those which are more innovative and could have made a real difference in the *prevention* or *compensation* of discrimination, are so vague and ambiguous that they leave it entirely to MS and other actors to take action. That is the case with positive action measures or social dialogue initiatives, which could have played a stronger role in preventing discrimination and addressing the group aspects of racism, ie in increasing *ex-ante effectiveness*. For instance, in Britain and Spain the RED has not really sparked the adoption of positive action measures, either at the initiative of employers or through collective bargaining. The fact that the RED

simply *allows* positive action has led British and Spanish legislation to follow that same pattern. As Chapter 6 suggests, this has meant that, in practice, few employers have adopted such measures, and when they have, other non-legal factors have prompted such initiatives, such as businesses' willingness to reflect cultural sensitivity towards racial discrimination, social awareness of the problem, and trade unions' pressure. To some extent, a similar problem arises with the RED's regulation of equality bodies. As discussed in Chapter 5, the RED conceives equality bodies as the main providers of independent assistance to victims, but it does not define the term 'assistance' and, strictly speaking, it does not require *the body* itself to be independent. This wording leaves the door open to inconsistencies and paradoxical situations, as it is the case of the British Equality and Human Rights Commission ('EHRC'), which is – theoretically – an organically independent body but does not provide direct assistance to victims anymore, whilst on the contrary, the Spanish Racial Equality Council ('SREC'), despite being organically dependent from a Government Ministry, provides independent assistance to victims thanks to partnerships with anti-discrimination NGOs.

Even though the wording of the RED provisions concerning ex-post effectiveness is less ambiguous, it is still vague enough to allow MS to implement them at such a minimal level that it actually compromises the effectiveness of the whole directive and the practical relevance of the prohibition of racial discrimination. The fact remains that in many MS the RED provisions have not been sufficient to prompt legal strategies to minimise the harm suffered by victims a posteriori or to address systemic discrimination through litigation. For instance, although the CJEU has accepted that the RED protects against 'victimless' racial discrimination, MS are not obliged to allow legal persons to start an action against discrimination without the consent of a specific victim or in the name of the public interest, so British law, as many other EU jurisdictions, does not allow it.¹ Hence, most times victims continue to bear the burden of taking action against discrimination.

¹ Note that whilst the Spanish 'collective conflict' is a sort of *actio popularis* that trade unions can initiate without an identified victim, this action existed prior to the RED.

Finally, the comparative analysis between Britain and Spain has revealed that even where the RED gives a stronger and a clearer mandate, as it is the case with the shift of the burden of proof, it may be that only superficial harmonisation is achieved. For instance, both the British and the Spanish legal systems have provisions mandating the shift of the burden of proof to the respondent when there is sufficient evidence of discrimination. In practice, however, British Tribunals apply a rather structured and consistent test, whilst Spanish courts tend to *state* the principle, but they rarely *apply* it in a detailed and reasoned manner, which increases uncertainty and the obstacles that victims must face.

8.3 Which factors and actors are crucial for improving the effectiveness of the RED at national level?

Given the shortcomings of the RED to spur effective legislation and policies at national level, the comparative chapters put the emphasis on the factors and actors which can play a role in addressing some of the issues that the RED leaves wide open. Considering that the burden to take action in the event of discrimination lies with the victim, who is the weakest party in the employment relationship, I have attempted to analyse the functioning of the law and the role of filters taking especially into account the position of victims and the potential obstacles that they have to face. In this process, I have identified two types of factors which have an impact on the effectiveness of racial equality frameworks: general factors and specific factors.

8.3.1 General factors

General factors relate to the socio-economic situation of MS, their legal history and culture, and SASFs' values. A first aspect that emerges from the analysis is the historical relevance and role played by equality law within each legal system. Clearly, equality law has developed through different paths in Britain and Spain. British equality law first materialised in the late 1960s, and nowadays it has probably come to its maturity, whilst in Spain it only started to properly develop in the 1990s and it is still at an infancy stage. Also, the RED was partially inspired by Dutch and UK equality law, so its provisions, including its enforcement mechanisms, are closer to the British ones, whilst Spain had to make

a stronger effort to implement them. For instance, Spain had to create an equality body from scratch, and transpose the prohibition of instructions to discrimination and the protection against victimisation into its legislation,² whilst British law was already in line with the RED in these regards.³ Furthermore, since the late 1970s a wide range of British trade unions and local NGOs have raised awareness, and provided support, advice etc to racial discrimination victims, overall empowering them to take action against racism.⁴ Additionally, employment discrimination claimants have not started to pay fees to bring proceedings until very recently. This, together with some high profile cases and award levels over the average (compared to other employment proceedings), has probably contributed to high litigation rates in Britain. On the contrary, litigation rates remain very low in Spain due to, inter alia, low awareness levels, victims' fears and potential costs.

Second, national discourses about racism and social values, which are incorporated into SASFs' values, also seem to have had an influence in the way that Britain and Spain have received the RED. Since the 1970s Britain has had legislation, litigation, state-supported bodies, NGOs and public discourses which have shamed racism and legitimised equal racial rights. This, especially after the Stephen Lawrence case, has given racial equality social recognition,⁵ which arguably encourages institutions and private organisations to be more active in racial discrimination prevention policies, because they have public endorsement. On the contrary, in Spain, racism is still today strongly linked to immigration, even if many migrants have already acquired Spanish citizenship or permanent residence. Institutional actions against racial discrimination have only timidly developed, and social awareness about racial discrimination and endorsement for active prevention policies are low, compared to Britain and compared to

² However, the concept of protection against victimisation (*garantía de indemnidad*) had already been developed in the Constitutional Court case law, on the basis of article 24(1) of the Constitution, see eg STC 114/1989 de 22 junio. For the transposition of these provisions, see Ley 62/2003, arts 17(1), 28(2) and 33.

³ Race Relations Act 1976, s 2(1), 30, 43-52.

⁴ F Reeves, *Race Equality in Local Communities. A guide to its promotion* (Race Equality West Midlands 2006) 43-50.

⁵ R Koopmans and P Statham, 'Political Claims-Making against Racism and Discrimination in Britain and Germany' in J ter Wal and M Verkuyten (eds), *Comparative Perspectives on Racism* (Ashgate 2000) 139.

gender equality legislation, which has been –and still is– the priority ground in Spain.

Third, our analysis has repeatedly shown that the economic crisis is having a negative impact on the effectiveness of racial equality legislation. In Britain, budget cuts have strongly undermined the human and material resources of the EHRC, which is required to use its enforcement powers so selectively that it cannot afford to address many of the discrimination issues arising in practice. Using the crisis as the legitimising reason, the British Government has also embarked upon a number of legal reforms to reduce bureaucracy for businesses which, on the one hand, have introduced tribunal fees, which have already had a visible impact on the lower number of discrimination claims filed, and on the other hand, may remove tribunals' powers to make general recommendations. This institutional climate has also weakened trade unions' relative bargaining power to introduce, or even maintain, equality clauses in collective agreements. Although the Spanish Race Equality Council was already created in a context of austerity and is thus relatively efficient, its further development as a true enforcement body is currently 'frozen' partly due to its limited budget. Furthermore, the Spanish employment legislation reform, designed to reactivate the economy, has weakened the potential of collective bargaining as a tool to promote ex-ante effectiveness.

Fourth, the comparative analysis has shown that regulation can be a key driver for both ex-ante and ex-post effectiveness, but to generate change it needs to be combined with soft-law measures and policies, and be activated by key social actors. Ideally, to boost ex-ante effectiveness, stakeholders and ethnic minorities views should be fed into regulation, but the process can also work the other way round. For instance, through the years, regulation, together with public discourse and social actors, has lead British society to develop awareness towards racial discrimination. On the other hand, the British and Spanish examples also demonstrate that regulation can either debilitate or reinforce mechanisms such as collective bargaining or positive duties, but for these mechanisms to be effective, regulation is not sufficient: other elements are

necessary, such as a balanced bargaining power among social partners or the engagement of management and staff with the equality objectives.

Overall, these general factors confirm that the ‘shop floor of social life’,⁶ formed by SASFs’ internal values and needs, has indeed a strong influence on how racial equality laws and policies are perceived socially, and hence, on how individuals and organisations integrate them into their daily lives. SASFs are sensitive to external regulation, but arguably, the more regulation and SASF values⁷ match each other, the higher the effectiveness will be. Additionally, SASFs are sensitive to other external stimuli, like economic constraints, which can undermine the effectiveness of racial equality laws and policies, unless the latter are adapted to the circumstances.

8.3.2 Specific factors

One of the crucial ideas that both the theoretical and the comparative part of this thesis have highlighted is that *preventing* discrimination is more effective than *remedying* it. In other words, ex-ante effectiveness should be preferred over ex-post effectiveness. However, Chapter 7 has also demonstrated that getting employers to develop preventive equality policies with practical relevance is a complex task which seems to require a mishmash of *push factors*, namely, legal duties to adopt such policies, and *pull factors*, ie social sensitivity towards racism and public recognition for racial equality policies.

Apart from the difficulties of synergising these factors, there are other elements which are also relevant for the development of effective policies to prevent discrimination. One of the crucial aspects is that equality policies are forged through a deliberative process where both employees –especially those belonging to vulnerable groups– and their representatives are involved, so that SASFs’ values and needs are reflected therein. Hence, compared to employers’ unilateral policies, it seems that *collective bargaining*, as a participative mechanism, can work better to prevent discrimination in the long term because equality clauses inserted in collective agreements are bilateral commitments

⁶ See Ch 2, text to n 47.

⁷ In other words, social communities’ values.

which cannot be changed at the employer's free will. Furthermore, trade unions may be able to push for clauses which employers would not adopt on purely economic grounds because businesses are inevitably driven by their outturn and tend to need external incentives to develop equality policies. However, the British and Spanish examples show that there may also be caveats in the use of collective bargaining because: (1) low regulatory and institutional support decreases trade unions' bargaining power, as it is currently the case in Britain; and (2) discrimination may also arise within trade unions themselves or from collective bargaining.⁸ To overcome this last limitation, the trade union movement and its hierarchy should adequately represent ethnic minorities and train officers to negotiate equality clauses.

Positive duties also have the potential of preventing discrimination and promoting equality, but the British and Spanish cases show that there are several obstacles for them to be effective: (1) they are rarely based on a deliberative process allowing employees to shape the duty to their needs; (2) the duties should be designed in a specific, action-based and goal oriented manner –which is not the case of the British duty; (3) and even then, management and staff of the relevant institutions must be committed to carry out the duty in a comprehensive and meaningful way. Whilst this is not easy to achieve, as both the Spanish and the British experiences show, the best way to engage managers and staff is probably through participative processes which allow them to fix the duty objectives in accordance to SASFs' values and needs. Eventually, this may be more effective to prevent discrimination in public institutions than the threat of formal sanctions,⁹ which are not always perceived as a real risk and can end up distorting the whole purpose of positive duties.

In addition, the Spanish example demonstrates that *equality bodies* can also play a remarkable role in preventing systemic discrimination if they have local presence (either directly or through other bodies) and regular contact with ethnic minorities' communities and employers. For instance, Spanish NGOs belonging to the SREC and working as local contact points have been able to

⁸ L Mason, 'The Hollow Legal Shell of European Race Discrimination Policy: The EC Race Directive' (2010) 53 *American Behavioral Scientist* 1731, 1743.

⁹ S Fredman, *Discrimination Law* (2nd edn, 2011 OUP) 309.

persuade employers to hire candidates from ethnic minorities who had initially been rejected, which created positive role models.

In a second stage, when prevention fails and discrimination occurs, the main obstacles for ex-post effectiveness are social lumping, derived from underreporting, and institutional lumping, due to barriers to access the legal system. Regarding *social lumping*, Chapter 6 has demonstrated that filters can play a key role in identifying discriminatory situations and empowering victims to take action. Nevertheless, to achieve that, filters—especially, equality bodies, trade unions and NGOs—need to work in partnership, so they can complement each other. In this regard, to reduce underreporting it is crucial that they provide assistance to victims and, ideally, that they work locally to be accessible and have regular contact with vulnerable communities.¹⁰ This allows filters to be perceived as trusted partners with whom victims are willing to talk, and it also facilitates the identification of discrimination when victims are not able to perceive it. In this regard, compared to the British EHRC, which has stopped advising and having direct contact with victims, the SREC, which has local presence thanks to its NGOs' Network, is better prepared to address social lumping.

On the other hand, legal fragmentation may compound social lumping because it hinders the transmission process which is necessary to inform ethnic minorities about their rights and how to exercise them. In that regard, Chapter 4 suggests that the Spanish patchy legislation may be an obstacle for victims to understand their rights. Additionally, Chapter 5 indicates that high levels of uncertainty and inconsistency in the award of remedies, and high litigation costs (especially if they are likely to exceed financial compensation) may also boost social lumping.

However, even if victims are able to overcome social lumping, if they want to initiate a judicial procedure, they will have to face *institutional lumping* (ie systemic barriers to access justice). According to the comparative analysis, institutional lumping could be reduced by broadening active standing rules.¹¹ For

¹⁰ See s 6.2.2.1.

¹¹ See eg R Moorhead, 'An American Future? Contingency Fees, Claims Explosions, and Evidence from Employment Tribunals' (2010) 73 MLR 752, 765; T Colling, 'Trade Union Roles in Making

instance, the Spanish experience shows the functionality of allowing trade unions to bring claims in the name of a circumscribed –although maybe undetermined– group of (potential) workers. Whilst giving that power to trade unions may also entail some risks,¹² other jurisdictions could benefit from enabling more neutral institutions (eg equality bodies) to bring some sort of similar multi-party actions. This would bring at least two advantages: if there are clear victims, it would protect them from retaliation;¹³ if there are not, it would allow to address institutional discrimination through judicial procedures.

Nevertheless, even if victims are able to overcome insitutional lumping arising from standing rules, they will encounter the additional hurdle of persuading the judge that they have been discriminated against. Although this should be facilitated through the two stage burden of proof test, Chapter 4 has proved that shifting the onus probandi to the respondent is difficult to achieve in practice due to limitations inherent to the test itself (eg the artificial consideration of evidence in two stages). Specialised training of legal professionals¹⁴ and encouraging third-party interventions¹⁵ could help improve consistency in the application of the burden of proof test. However, they may not lead to substantial changes because the shortcomings also arise from the fact that a third party –the judge– needs to be persuaded by the victim and has the power to decide the outcome of the dispute.

Hence, once the victims overcome social lumping, filters can play a key role in directing them towards the most convenient dispute resolution system, according to the circumstances of their case.¹⁶ In this regard, at very early stages,

Employment Rights Effective' in L Dickens (ed), *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Hart 2012) 183, 184.

¹² See text to n 8.

¹³ In this case, however, victims' consent should be required to ensure that the judicial procedure is not to their detriment.

¹⁴ D Houtzager, *Changing Perspectives: Shifting the burden of proof in racial equality cases* (ENAR 2006) 25.

¹⁵ For instance, as discussed in Chapter 5, the tribunal itself requested the intervention of the EHRC in *Pothecary Witham Weld v Bullimore* [2010] ICR 1008 (EAT).

¹⁶ In this regard, it could be argued that relying on 'no win no fee' solicitors may entail risks because their advice may not always be in the victim's best interest, but rather on how to secure a high financial compensation, see J Aston, D Hill and N D Tackey, *The experience of claimants in race discrimination Employment Tribunal cases* (Employment relations research series No 55, Department for Trade and Industry 2006) xi, 60-61.

trade unions may be able to informally negotiate within the organisation, and similarly, NGOs may be able to network with employers to address discrimination. On the contrary, when the dispute has already become acrimonious, litigation may be the best way forward if the victim has strong evidence, the case is very serious or a key legal development is at stake. Otherwise, non-adjudicatory ADR mechanisms may be preferable to reduce confrontation and allow the parties to control the outcome of the dispute. Nevertheless, discrimination disputes raise human rights issues which should be subject to public scrutiny and not be totally left to parties' private autonomy. For this reason, ADR procedures need to be used mindfully to ensure that parties profit from the potential advantages, whilst at the same time the most serious and novel cases are still subject to judicial ruling. In this respect, judicial mediation systems based on selective invitations according to the circumstances of the case,¹⁷ where mediation is conducted by a trained mediator but the final outcome has to be validated by a judge, can be an appropriate way to introduce ADR in employment discrimination disputes.

8.3.3 Concluding remarks

This thesis has highlighted the areas where there is potential room for improvement in legislation and policy, so that further empirical investigations can validate these results and confirm the best way forward. In this regard, at least two fields could be additionally explored. Firstly, empirical research with victims and employers –and maybe other stakeholders– could focus on the relevance of awareness, values and social perceptions for preventing racial discrimination. Secondly, an empirical study based on questionnaires and interviews with victims, employers and mediators could be useful to enlighten the extent to which ADR mechanisms –and especially judicial mediation– can be beneficial for both parties in discrimination disputes.

On the whole, the comparative analysis undertaken has suggested that the effectiveness of racial equality law depends on the successful interaction of filters and a mix of factors, among which social values and regulation play a crucial role.

¹⁷ Filters can also play a key role in orientating victims towards the most appropriate course of action depending on the circumstances of their cases.

Having said that, the effectiveness of racial equality law could be boosted if public policies shifted from the traditional focus on ex-post mechanisms, like litigation, to ex-ante strategies to prevent discrimination and promote equality, such as positive duties and equality clauses introduced through collective bargaining. However, given the difficulties of totally eradicating racial discrimination, ex-post strategies are also necessary to minimise the effects of discrimination when it occurs (and in some cases, they can also have positive impact on ex-ante effectiveness). For that purpose, it is crucial to tailor the use of litigation and ADR systems according to the circumstances of the case.

Overall, although the RED has been a stimulus for British and Spanish SASFs' values and legislation, and it has achieved some harmonisation, the national regulatory and social conditions have had a stronger influence on the development of racial equality legislation and policies. On the basis of these national factors, Britain and Spain have developed some effective regulatory strategies (ie positive duties in Britain and the collective conflict procedure in Spain), which go beyond the RED individual and corrective justice approach, but they remain isolated strategies which cannot bring groundbreaking changes on their own.

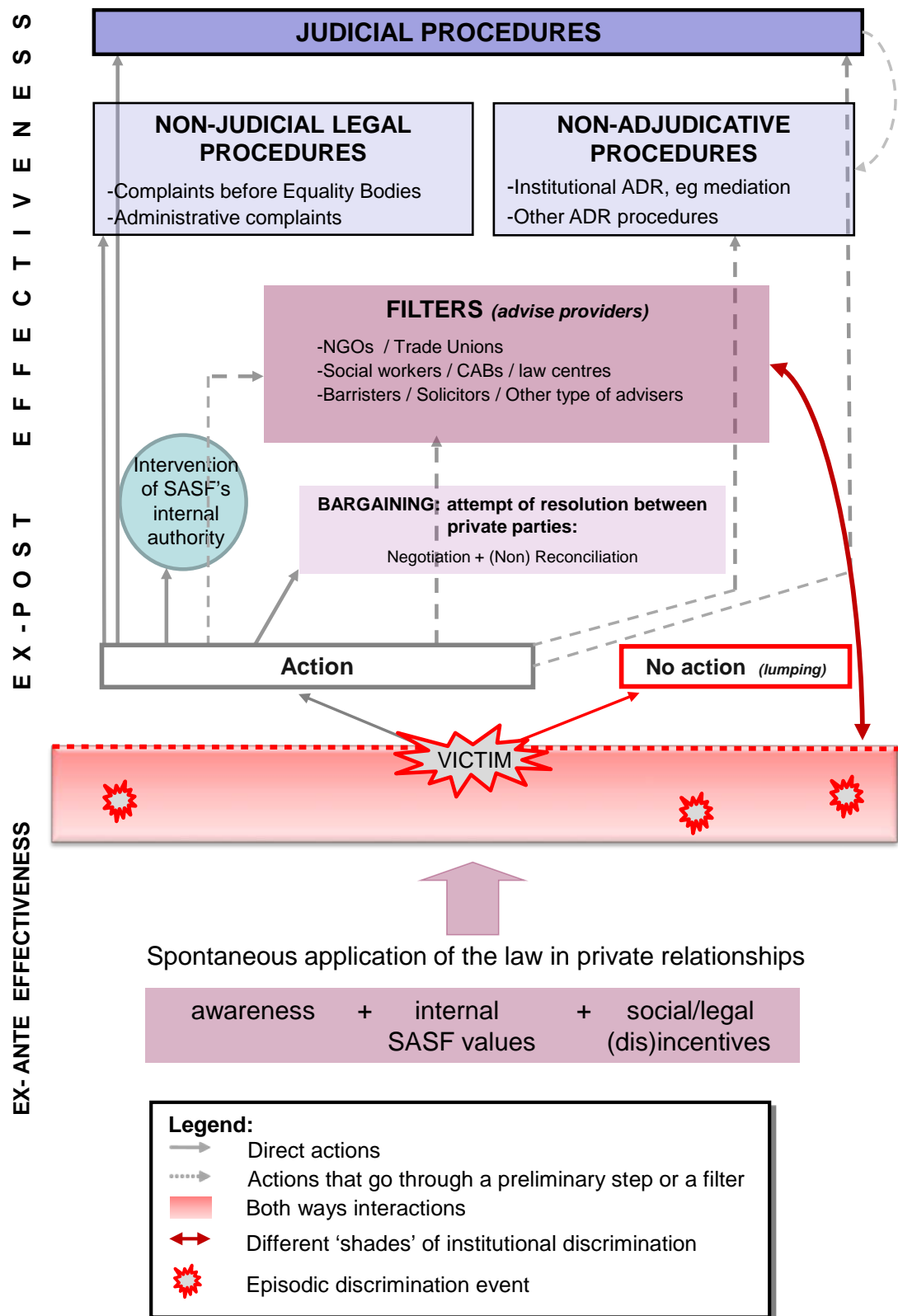
Annex 1. Types of interviewees

	Interviewee	Lawyer/ Barrister/ Legal professional	Equality Body	Trade Union	Business	NGO
B R I T A I N	Mr Robert Johnston (<i>Midlands Secretary at the Trade Union Congress, TUC</i>)	X	X	X		
	Mr Robin Allen (<i>Cloisters' partner, Barrister, specialist in anti-discrimination law</i>)					
	Ms Wendy Hewitt (<i>Deputy Legal Director at Equality and Human Rights Commission, EHRC</i>)					
	Ms Gay Moon (<i>Special Legal Adviser at Equality and Diversity Forum</i>)					X
	Mr Wilf Sullivan (<i>Race Equality Officer at TUC</i>)			X		
	Employment policy department at Confederation of British Industry, CBI				X	
S P A I N	Mr Miguel Ángel Aguilar (<i>Barcelona Public Prosecutor against Hate Crime</i>)	X				
	Secretaría de Estado de Igualdad , (<i>Spanish Racial Equality Council, SREC</i>)		X			
	Ms Sara Giménez Giménez (<i>Lawyer, Equality Director at Fundación Secretariado Gitano, FSG</i>)	X				X
	Ms Guadalupe Pulido Bermejo (<i>Director of Oficina Per la No Discriminació, Barcelona City Council</i>)		X			
	Ms Katrina Belsué Guillorme (<i>Lawyer, Discrimination Helpdesk Director, Sos Racismo Aragón</i>)					X
	Ms Ana Belén Budría Laborda (<i>In-house lawyer at the trade union 'Comisiones Obreras', CCOO</i>)	X		X		
	Mr Jose Ignacio Torres Marco (<i>Employment policy officer at Confederación Española de la Pequeña y Mediana Empresa ('CEPYME'), Social and Labour Policy Department</i>)				X	

Annex 2. Chronological summary of the interviews

Date and location	Interviewee
Spain (Barcelona) 03/01/2013	Mr Miguel Ángel Aguilar (<i>Barcelona Public Prosecutor against Hate Crime</i>)
UK (Birmingham) 31/01/2013	Mr Robert Johnston (<i>Midlands Secretary at the Trade Union Congress, TUC</i>)
UK (London) 15/02/2013	Mr Robin Allen (<i>Cloisters' partner, Barrister, specialist in anti-discrimination law</i>)
UK (London) 29/03/2013	<ul style="list-style-type: none"> – Ms Wendy Hewitt (<i>Deputy Legal Director at Equality and Human Rights Commission, EHRC</i>) – Ms Gay Moon (<i>Special Legal Adviser at Equality and Diversity Forum</i>) – Mr Wilf Sullivan (<i>Race Equality Officer at TUC</i>)
Spain (Madrid, Barcelona, Zaragoza, Huesca) 04/2013	<ul style="list-style-type: none"> – Secretaría de Estado de Igualdad (<i>Spanish Racial Equality Council, SREC</i>) – Ms Sara Giménez (<i>Lawyer, Equality Director at Fundación Secretariado Gitano, FSG</i>) – Ms Guadalupe Pulido (<i>Director of Oficina Per la No Discriminació, Barcelona City Council</i>) – Ms Katrina Belsué Guillorme (<i>Lawyer, Discrimination Helpdesk Director, Sos Racismo Aragón</i>)
UK (London) 17/06/2013	Employment policy department at <i>Confederation of British Industry, CBI</i>
Spain (Zaragoza) 15/07/2013	Ms Ana Belén Budría Laborda (<i>In-house lawyer at the trade union Comisiones Obreras, CCOO</i>)
Spain (Madrid-skype) 13/11/2013	Mr Jose Ignacio Torres Marco (<i>Employment policy officer at Confederación Española de la Pequeña y Mediana Empresa ('CEPYME'), Social and Labour Policy Department</i>)
13 interviews	

Annex 3. How racial discrimination operates in society and victims' decision making process



Source: Own elaboration.

Annex 4. Comparison between Early Conciliation in Britain and Spain

	Britain	Spain
VOLUNTARINESS	Contacting Acas before submitting an ET1 form is mandatory, but the parties are free to decline the invitation to conciliate.	Voluntary for discrimination disputes following the fundamental rights procedure.
COST	Free at the point of use.	Free at the point of use.
EFFECT ON TIME LIMITS	The running of the limitation period is suspended for up to one month (plus a further 14 days if needed).	If both parties agree to conciliate, the running of the limitation period is suspended.
TYPE OF CONCILIATOR	Acas trained conciliator.	Conciliators can be civil servants attached to an administrative body or can belong to one of the autonomous bodies created by agreement between trade unions and business representatives. In the latter case, they often are lawyers, but they do not always have specific ADR skills.
CONFIDENTIALITY	Anything said to the conciliation officer cannot be used as evidence in subsequent proceedings without the consent of the relevant party.	Anything said to the conciliation officer cannot be used as evidence in subsequent proceedings without the consent of the relevant party.
TYPE OF CONTACT	-Through the phone. -Exceptionally, face-to-face, by email or by letter.	Face-to-face.
DURATION	Up to 1 month (which may be extended for up to a maximum of 14 days).	30 days maximum.
INFORMATION	Information duties extend both to procedural and substantive rights, eg explaining the relevant law and tribunal procedures, helping the parties understand the strengths and weaknesses of their cases or the possible advantages of settling/going to a full hearing.	Information duties are not clearly established and can vary from one body to another.
CONCILIATOR ROLE	The Early Conciliation Support Officer initially contacts the prospective claimant and gathers basic information about the dispute. In a second stage, the conciliator contacts the prospective claimant and the respondent to attempt conciliation, if they have both accepted to conciliate.	-The role is not clearly defined in the legislation. -When the conciliators belong to an autonomous body, they are appointed by a trade union or by a business association.
OUTCOME	The agreement becomes binding when it is recorded by the conciliator in a COT3 form and it is signed by both parties.	The agreement is binding and directly enforceable (it does not need to be endorsed by the social court).

Source: Own elaboration on the basis of Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014, Acas (2014), Department for Business, Innovation & Skills (Britain); Ley de la Jurisdicción Social (Spain).

Annex 5. Comparison between Post-Claim Conciliation in Britain and Spain

	Britain	Spain
VOLUNTARINESS	Voluntary: the parties are contacted by the conciliator after they submit the ET1 form, but they can decline the invitation to conciliate.	Mandatory: the parties must attend the conciliation meeting. If the respondent does not appear, the meeting is not suspended. If the claimant does not appear, the claim is deemed to be withdrawn.
COST	Free at the point of use.	Free (no additional costs besides those associated to submitting the claim to the social court).
TYPE OF CONCILIATOR	Acas trained conciliator.	1) In a first stage, before the <i>judicial secretary</i> : -Civil servant attached to the same judicial body which will eventually rule on the matter, if there is no settlement; -Trained in legal skills and substantive law, but not necessarily in ADR techniques. 2) If conciliation before the judicial secretary is not successful, the judge can attempt to conciliate again.
CONFIDENTIALITY	Anything said to the conciliation officer cannot be used as evidence in subsequent proceedings without the consent of the relevant party.	After the last procedural reforms, the conciliation meeting is not public anymore. The judicial secretary who conducts the conciliation meeting is different from the one which attends the hearing.
TYPE OF CONTACT	-Through the phone; -Exceptionally, face-to-face.	Face-to-face.
DURATION	Can last more than seven weeks.	Usually, between 15 and 30 minutes.
INFORMATION	Conciliators have informative duties, which can extend both to procedural and substantive rights, eg explaining the relevant law and tribunal procedures, helping the parties understand the strengths and weaknesses of their cases or the possible advantages of settling/going to a full hearing.	Judicial secretaries must inform the parties of their 'rights and obligations' (no specific requirements regarding procedural rights or substantive rights).
CONCILIATOR ROLE	-They must remain impartial; -Their main role is promoting settlement and facilitating negotiations by discussing controversial issues and transmitting proposals from one party to the other.	-They must remain impartial; -Spanish law requires judicial secretaries to perform 'mediation functions', but it does not define those functions.
OUTCOME	-The agreement becomes binding when it is recorded by the conciliator in a COT3 form and it is signed by both parties. -Conciliators cannot offer their views on the fairness of the agreement.	-The agreement becomes binding when it is endorsed by the judicial secretary by decree. -The judicial secretary can reject endorsement if the agreement amounts to a serious breach of parties' rights, fraud of law or if it is contrary to the public interest.

Source: Own elaboration on the basis of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Acas (2011) (Britain); Ley de la Jurisdicción Social (Spain).

Annex 6. Comparison between Judicial Mediation in Britain and Spain

	Britain	Spain
AVAILABILITY	England, Wales and Scotland.	Madrid and Barcelona; (Former pilot project in Bilbao).
TYPE OF SELECTION	Discretionary - cases are selected by the employment tribunal, normally by the judge (at the Case Management Discussion).	Discretionary - cases are selected by the Social Court. In Madrid the parties can also take the initiative to request the participation in intra-judicial mediation.
SELECTION CRITERIA	-Single claims (or small group claims); -Discrimination disputes or unfair dismissal (exceptionally other complex cases too); -When the claimant is still in employment; -When the full hearing for substantive issues is expected to last at least three days; -Not eligible if the claim involves insolvency issues or there are claims in other jurisdictions.	- <u>Bilbao</u> : cases on harassment and human rights (including discrimination), family life, sanctions, working conditions, annual leave, rights' recognition and wages. - <u>Madrid</u> : cases on family life, sanctions, working conditions, annual leave, geographic mobility and disciplinary dismissal.
COST	Additional fee of £600 for discrimination cases.	No additional fees.
INVITATION & INFORMATION	The possibility to participate in judicial mediation is discussed at the Case Management Discussion (CMD), where the parties are given an information sheet (exceptionally, they can also be invited to participate in written).	- <u>Bilbao</u> : an invitation to an information session was sent together with the hearing date notification. In that session the parties were informed about the procedure and were asked about their willingness to take part. - <u>Madrid</u> : an information sheet is sent together with the hearing date notification.
MEDIATOR	Conducted by an employment judge trained in mediation.	Conducted by a trained mediator: - <u>Bilbao</u> : mediators provided by <i>Consejo de Relaciones Laborales</i> , a publicly funded body specialising in pre-claim conciliation, administrative mediation and arbitration. - <u>Madrid</u> : mediators provided by <i>Fundación Derechos Civiles</i> , an NGO.
OUTCOME	The terms of the agreement will be put in writing by the judge, who may contact Acas to incorporate the agreement to a COT3 form. It will then be legally binding. Otherwise, judicial mediation can also finalise by a compromise agreement.	The agreement will be put in writing by the mediator and it will then be ratified by the judge in a decision, which will be binding for the parties and directly enforceable.

Source: Own elaboration on the basis of Ministry of Justice, Acas (Britain); Ley de la Jurisdicción Social, CGPJ (2012; 2013), García Álvarez (2013), Consejo de Relaciones Laborales (2011) (Spain).

Annex 7. Data on judicial mediation take up and outcomes

Table 5. Results of mediation procedures started by invitation (2012).

MADRID	FEB-JUN		JUL-DEC		TOTAL	
	Observations	Percentage	Observations	Percentage	Observations	Percentage
Total number of invitations	319	66%	164	34%	483	100% ---
Invitations accepted	22	7%	8	5%	30	6% 100%
Invitations not accepted	297	93%	156	95%	453	94% ---
Claims disposed	6	2%	4	2%	10	2% 33%
Agreement	9	3%	3	2%	12	2% 40%
Lack of agreement	1	0%	1	1%	2	0% 7%
Agreement reached later	1	0%	0	0%	1	0% 0%
Mediation ongoing (pending)	5	2%	0	0%	5	1% 17%

Source: Own elaboration with data from Servicio de Planificación y Análisis de la Actividad Judicial (CGPJ).

Table 6. Results of mediation procedures started at the request of the parties (2012).

MADRID	FEB-JUN		JUL-DEC		TOTAL	
	Observations	Percentage	Observations	Percentage	Observations	Percentage
Total number of mediation requests	4	40%	6	60%	10	100%
Claims disposed	0	0%	1	17%	1	10%
Agreement	3	75%	4	67%	7	70%
Lack of agreement	1	25%	0	0%	1	10%
Mediation ongoing (pending)	0	0%	1	17%	1	10%

Source: Own elaboration with data from Servicio de Planificación y Análisis de la Actividad Judicial (CGPJ).

Table 7. Results of mediation procedures started by invitation (12/04/2010-10/01/2011).

BILBAO	MAY	JUN	JUL	SEPT	OCT	NOV	DIC	JAN	TOTAL	
Total number of invitations	6	8	6	8	3	6	4	2	43	100% ---
Invitations accepted	6	8	5	7	3	6	4	2	41	95% 100%
Invitations not accepted	0	0	1	1	0	0	0	0	2	5% ---
Agreement	0	2	1	1	1	3	1	1	10	23% 24%
Agreement reached later	1	1	0	0	0	0	0	0	2	5% 5%
Lack of agreement	2	2	2	2	1	0	1	0	10	23% 24%
Default of appearance	1	3	2	4	1	3	2	0	16	37% 39%
Withdrawals	2	0	0	0	0	0	0	1	3	7% 7%

Source: Own elaboration with data from Consejo de Relaciones Laborales (Bilbao).

Table 8. Results of mediation procedures between June 2006 and March 2007.

NEWCASTLE, BIRMINGHAM, CENTRAL LONDON	Mediates cases		Unmediated/interested		Unmediated/ not interested		Total
	Observations	Percentage	Observations	Percentage	Observations	Percentage	
Number of Cases experiencing judicial mediation	116	100%	80	100%	472	100%	668
Number successfully resolved at mediation (resolved without a Hearing)	66	57%	49	61%	255	54%	370

Source: Own elaboration with data from Urwin, Karuk and Latreille (2010).

Annex 8. Actions which Spanish public authorities are bound to take within the gender positive duty

Field	Action
<i>Access to employment</i>	<ul style="list-style-type: none"> -Public authorities must eliminate any obstacle leading to gender discrimination in the access to the civil service – art 51(a) GEL. -A gender impact assessment must be attached to public competitions to enter the civil service – art 55 GEL.
<i>Career/promotion</i>	<ul style="list-style-type: none"> -Public authorities must eliminate any obstacle leading to gender discrimination in terms of career development - art 51(a) GEL.
<i>Training</i>	<ul style="list-style-type: none"> -Public authorities must encourage training in the field of equality, in the access to employment and for career development – art 51(c) GEL. -Employees returning from maternity or paternity leave should have preference in training courses for a year – art 60 GEL. -In public competitions to enter the civil service, candidates will be required to have knowledge on gender equality – art 61(1) GEL. -Public authorities should offer internal courses on gender equality and domestic violence – art 61(2) GEL.
<i>Conciliation/family life</i>	<ul style="list-style-type: none"> -Public authorities must facilitate conciliation of personal and family life - art 51(b) GEL. -Relevant legislation must develop a system of personal leave, reduced working hours, permits and other benefits – art 56 GEL. -Time spent under personal leave, reduced working hours, permits, etc will be considered for merits and promotion purposes – art 56 GEL.
<i>Balanced gender presence</i>	<ul style="list-style-type: none"> - Recruitment and assessment bodies belonging to the National Administration must have a balanced gender presence – arts 51(d), 53 GEL. -The governing bodies of public authorities belonging to the National Administration must have a balanced gender presence – art 52 GEL. -National Administration representatives in collegiate bodies (national or international) and management boards of companies with public capital must be gender balanced – art 54 GEL.
<i>Harassment</i>	<ul style="list-style-type: none"> Public authorities must take effective protective measures against sexual harassment and harassment based on gender, including the development of a protocol against harassment – arts 51(e), 62 GEL.
<i>Equal pay</i>	<ul style="list-style-type: none"> -Public authorities must take effective measures to eliminate pay discrimination on the ground of gender – art 51(f) GEL.
<i>Evaluation</i>	<ul style="list-style-type: none"> -Public authorities must regularly assess the effectiveness of the principle of equality in their different areas of action – art 51(g) GEL. -Ministers and Public Agencies must submit, at least once a year, information on the application of the gender equality principle (figures broken down by gender, grade, education and remuneration) – art 63 GEL.

Source: Own elaboration on the basis of the Spanish Gender Equality Law ('GEL').

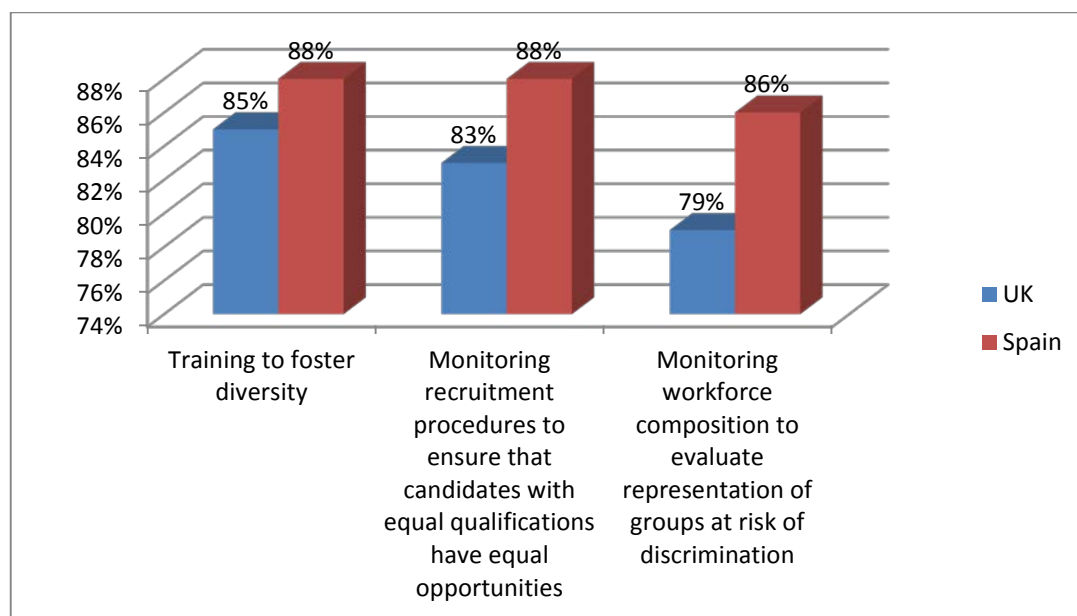
Annex 9. Material obligations derived from the Specific Equality Duties in England, Scotland and Wales.

	Need to publish equality information	Need to publish equality objectives or outcomes	Equal pay	Assessing impact of policies	Mainstreaming	Strategic equality plans
E N G L A N D	Yes -For public authorities with more than 150 employees, the information must relate: -to its employees, and -to other persons affected by its policies and practices. - <u>Time frame</u> : at least once a year.	Yes -One or more objectives linked to section 149(1) EqA 2010, para (a)-(c), which must be specific and measurable. - <u>Time frame</u> : at least once every four years	No	No	No	No
S C O T L A N D	Yes -Duty to gather employees information, including: →employees' composition →recruitment, development and retention of employees. - <u>Time frame</u> : at least once a year.	Yes - <u>Time frame</u> : at least once every four years.	Yes -Duty to publish information in equal pay and occupational segregation on the ground of gender, disability and ethnicity. - <u>Time frame</u> : at least once every four years.	Yes	Yes	
W A L E S	Yes -The duty involves collecting employees' information broken down by job, grade, pay, contract type, working pattern. Furthermore, it must include information on job applicants, position changes, employees' retention, training, and employees affected by grievance and disciplinary procedures. - <u>Time frame</u> : at least once a year	Yes -The public authority must estimate how long it will take to fulfil the objectives. <u>Time frame</u> : at least once every four years.	Yes -The equality objectives must address pay gaps between persons having a protected characteristic and persons who do not have it. -The public authority must adopt an action plan with policies to address the pay gaps identified.	Yes	No	Yes The plan must include, inter alia, the public authority objectives, the correlative actions envisaged, the time frame, and the monitoring arrangements.

Source: Own elaboration on the basis of the English Scottish and Welsh Equality Act 2010 (Specific Duties) Regulations.

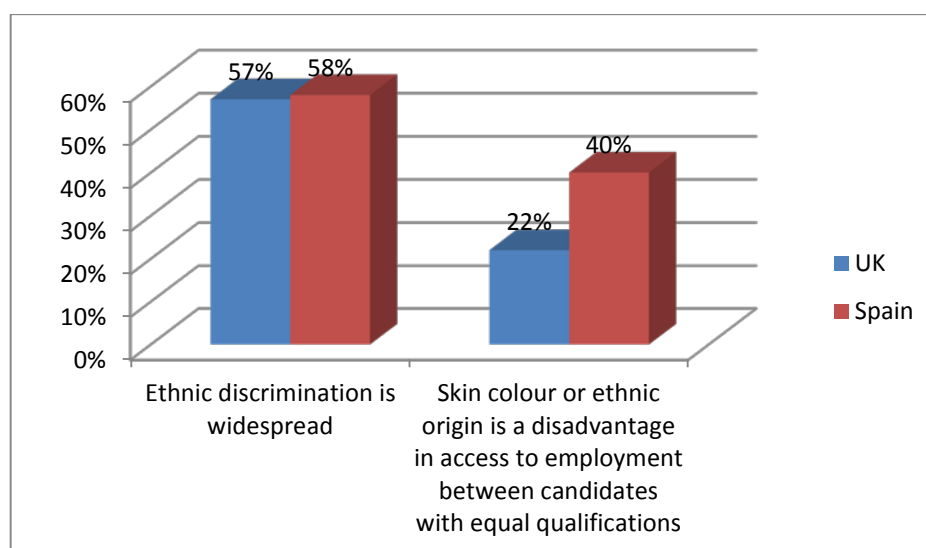
Annex 10. Ethnic diversity policies in Britain and Spain.

Figure 9. Support for workplace policies to foster diversity and equal opportunities (2012).



Source: Special Eurobarometer 393.

Figure 10. Perceptions about ethnic discrimination (2012).



Source: Special Eurobarometer 393.

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